A Laws of Ind. 1818 - p 232 -
may not be assignable -
- R. S. 1831. Ind. 1 Same act. making note
1838. Ind. assignable
1843, act making Bill & Recharge ...
R Rep. Chap 22. (Ditto Bill)
Ind. 2 Ab. 31, Miss. - 216 = Judge Handy.
Morris Canal & Bank - 1. Stockton's Ch. Rep. 697 -

13 Indiana 61 -

SUPREME COURT OF THE UNITED STATES.

No. ~~280~~ 193. 101.

Mr Justice Davis

CHARLES MORAN, THEODORE T. MORAN AND DANIEL E. MORAN, PLAINTIFFS IN ERROR,

619

vs.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF MIAMI.

619

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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Pleas of the Circuit Court of the United States for the Seventh Judicial Circuit and District of Indiana, begun and holden at Indianapolis, in said district, before the Honorable Elisha M. Huntington, District Judge of the United States for the District of Indiana, on the seventh day of January, in the year of our Lord one thousand eight hundred and sixty.

CHARLES MORAN,
THEODORE T. MORAN, and
DANIEL E. MORAN
vs.
THE BOARD OF COMMISSIONERS
OF THE COUNTY OF MIAMI.

Assumpsit.

Be it remembered, that heretofore, to wit: on the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, the plaintiffs, by their attorneys, filed in the Clerk's office of said Court their certain declaration in writing in the words and figures following, to wit:

Circuit Court of the United States,
District of Indiana.

May Term, A. D. 1859.

Charles Moran, Theodore T. Moran, and Daniel E. Moran, citizens of the State of New York, partners, doing business within the city of New York, under the name and style of Moran Brothers, plaintiffs in this suit, complain of the Board of Commissioners of the County of Miami, a corporation created and existing under and in virtue of the constitution and laws of the State of Indiana, and a citizen of the said State, defendant in this suit of a plea of trespass on the case on premises.

For that whereas, heretofore, to wit: on the twenty-first day of August, A. D. 1851, at the said County and State, in pursuance of powers conferred upon the said defendant by the laws of said State, and more particularly by the provisions of the Act of the General Assembly of said State, approved January 5th, 1849, entitled "An Act to authorize the Commissioners of Hamilton, Miami, and Tipton counties to borrow money," whereby it was, and is among other things enacted, that the Board of Commissioners of the counties of Hamilton, Miami, and Tipton should be, and were, and each of said Boards was authorized to borrow money for railroad purposes in any amount not exceeding fifty thousand dollars, from time to time, at any rate of interest not exceeding ten per cent. per annum; and that all persons loaning money to said Boards, or either of

them, should be and were authorized to receive any rate o interest upon such loans, as might be agreed upon, not exceedin ten per cent. per annum. The said defendant caused, and autho rized to be made, and issued by the County Auditor of sai county, and the agent of said defendant for that purpose, in th name of said county, fifteen several instruments in writing, com monly called "county bonds." bearing date the day and yea aforesaid, signed by Ira Mendenhall, auditor of said county, an authenticated by the seal of the said Board affixed to each, an numbered 16 to 30 inclusive, whereby, and by each of which, sai instruments in writing, it was and is certified that there was du to the President and Directors of the Peru and Indianapolis Rail road Company, or bearer, one thousand dollars from the county of Miami, in the State of Indiana, payable in ten years from th (first day of September, A. D. 1851,) but which might b redeemed after eight years from the date thereof at the option o the Board of Commissioners of said County, bearing interest a the rate of ten per cent. per annum, payable at the end of eac year, from the date thereof, at the office of the Treasurer of said county in Peru, on the presentation of the annexed interest war rants, where the principal would, as is certified, also be paid, i being declared in and by the said instrument, or bond, that th same was issued for a loan of the amount thereof to said county as authorized by the Act of the General Assembly of the said State, entitled and approved, as aforesaid, and the resolutions o the Board of Commissioners of Miami County; and it was and is further certified, and declared in, and by the said bond, or instru ment, that, for the redemption and payment of said bond, both principal and interest, as above stipulated, the faith of the county of Miami and the stock of said county in the Peru and Indiana polis Railroad Company are irrevocably pledged.

And the plaintiffs further say, that annexed and attached to each of said bonds were the interest warrants mentioned in said bonds, to wit: Ten warrants to each, severally signed by said Ira Mendenhall, County Auditor, by order of said defendant, whereby, and by each of said warrants, the Treasurer of said county was directed to pay the legal holder thereof. One hundred dollars on the 1st day of September, on the presentation thereof, that is, to say, one hundred dollars on the 1st day of September, 1852; one hundred dollars on the 1st day of September, 1853; one hundred dollars on the 1st day of September, 1854; one hundred dollars on the 1st day of September, 1855; one hundred dollars on the 1st day of September, 1856; one hundred dollars on the 1st day of September, 1857; one hundred dollars on the 1st day of September, 1858; one hundred dollars on the 1st day of September, 1859; one hundred dollars on the 1st day of September, 1860; one hundred dollars on the 1st day of September, 1861— certified in said several warrants to be for interest due on the said

several fifteen obligations of said county of the numbers and description hereinbefore mentioned.

And the plaintiffs further say, that the said several bonds, obligations, or instruments in writing were then and there duly delivered to the said President and Directors of the Peru and Indianapolis Railroad Company, with the said interest warrants annexed as aforesaid, and that afterwards, to wit: on the day and year aforesaid, the said Railroad Company, by its president and agent, John Bonk, duly endorsed the said several bonds, or obligations, with the said interest warrants attached, and the said plaintiffs are now and were at the times hereafter mentioned the lawful owners and holders thereof, and of each of them, except that the interest warrants, due in years preceding 1857, have been paid to the plaintiffs, of which defendant had notice.

And the plaintiffs further say, that the said defendant has not paid to the plaintiffs the interest warrants, nor the interest due and payable on said bonds, or obligations, according to their tenor, which became due and payable on the 1st day of September, 1857, and first day of September, 1858; nor the interest on either of said bonds for either of said years, although after requested so to do, but has hitherto wholly neglected and refused; and the plaintiffs further say, that heretofore, to wit: on the 8th day of April, A. D. 1859, the said plaintiffs, being then and there the legal owners and holders of each and all of the said bonds, or obligations, and of the interest warrants hereto attached, which became and were severally due and payable on the first day of September, in the year 1857, and on the first day of September, in the year 1858, they, the said plaintiffs caused the said interest warrants, so due and payable on the first day of September, 1857, and first day of September, 1858, to be presented for payment at the office of the Treasurer of said county of Miami, at Peru, in said county, and payment was then and there demanded, but that the same were not paid, nor either of them, nor any part of either of them, of which the said defendant then and there had notice, by means whereof the said defendant became liable to pay the said plaintiffs the said several sums of money in the said several interest warrants specified, when the same should be afterwards requested, and being so liable, the said defendant afterwards, to wit: on the day and year aforesaid, at &c., aforesaid, undertook, and then and there faithfully promised the plaintiffs to pay them the said sums of money on the said several warrants specified when thereunto afterwards requested; yet the said defendant has hitherto disregarded the said promises, and has not hitherto paid the said moneys, or any part thereof, to the damage of the said plaintiffs four thousand dollars, and therefore they bring suit.

MORRISON & RAY,
Attorneys for Plaintiffs.

(*Copy of one of the Bonds* (*No.* 16), *the others being of like tenor and effect, and being the same date.*)

"United States of America,
"No. 16. State of Indiana, $1000.
County of Miami.

"Know all men by these Presents, that there is due to the President and Directors of the Peru and Indianapolis Railroad Company, or bearer, 'one thousand dollars,' from the county of Miami, in the State of Indiana, payable in ten years from the first day of September, A. D. 1851, but may be redeemed after eight years, at the option of the Board of Commissioners of said county, bearing interest at the rate of ten per cent. per annum, payable at the end of each year, from the date hereof, at the office of the Treasurer of said county, in Peru, on the presentation of the annexed 'interest warrants,' where the principal will be also paid. This bond being issued for a loan of the amount thereof to said county, as authorized by an Act of the 'General Assembly' of the State of Indiana, entitled 'An Act to authorize the Commissioners of Hamilton, Miami, and Tipton counties to borrow money,' approved January 5th, 1849, and the resolutions of the Board of Commissioners of Miami county, and for the redemption and payment of this bond, both principal and interest, as above stipulated, the faith of the county of Miami and the stock of said county in the Peru and Indianapolis Railroad Company are irrevocably pledged.

"Witness, Ira Mendenhall, auditor of said county, and
[SEAL.] ex-officio clerk of said Board of Commissioners, and the seal of said board hereunto affixed by said auditor, by order of said board at a regular meeting thereof, this twenty-first day of August, A. D. 185[illegible].

"IRA MENDENHALL, *Auditor Miami Co.*"

(*Copy of Interest Warrant, payable first September, A. D.* 1857, *attached to Bond, No.* 16.)

"Auditor's Office, Miami County, Peru, Ind.

"The Treasurer of said county will pay the legal holder thereof 'one hundred dollars' on the first day of September, 1857, on presentation hereof, being for interest due on the obligation of said county, No. 16, given to the Peru and Indianapolis Railroad Company.

"By order of the Commissioners.
"$100. "IRA MENDENHALL, *County Auditor.*"

(*Copy of Interest Warrant, payable first September,* 1858, *attached to same Bond.*)

"This is of the same tenor as the foregoing, only payable first

September, 1858. The other warrants are of the same tenor, two of each of them payable as the foregoing, being attached to each of the other fifteen bonds."

And thereupon, on the same day, to wit: on the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, there was issued from the clerk's office of said court, in due form of law, under the seal of said court, a writ of summons, returnable on the 3d Monday in May, then next ensuing, directed to the marshal, &c., commanding, &c., and which is in the words and figures, to wit:

Summons.

The President of the United States of America
To the Marshal of the District of Indiana—greeting:

You are hereby commanded to summon "The Board of Commissioners of the county of Miami, a citizen and resident of the State of Indiana, if she may be found in your district, to be and appear before the Circuit Court of the United States for the District of Indiana, to be holden before the Judge thereof at Indianapolis, in said district, on the third Monday in May next, to answer unto Charles Moran, Theodore T Moran, and Daniel E. Moran, citizens of the State of New York, in a plea of assumpsit, damages four thousand dollars, ($4,000.)

And have you then and there this writ.

Witness Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of the Circuit Court of the United States, for the District of Indiana, [SEAL.] hereto affixed at Indianapolis, this fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine.

H. BASSETT,
Clerk.

Which said writ was then and there delivered to the Marshal of said District, and which was by him afterwards duly returned to the office whence the same issued, endorsed as follows:

"Served the within, as commanded, on the Board of Commissioners of Miami County, by reading, and copies delivered to Ethan Durston and Allen S. Killman, two of the Commissioners of said County, personally in Miami County, Indiana, April 23d, 1859, not found in my District, as to the other Commissioner of said County.

JOHN L. ROBINSON,
U. S. Marshal.
By DAVID LAING,
Deputy.

And afterwards, to wit, at a Circuit Court of the United States, for the Circuit and District aforesaid, begun and holden at Indianapolis aforesaid, before the Honorable Elisha M. Huntington, District Judge of the United States, for the District of Indiana, on Tuesday, the eighteenth day of May, in the year of our Lord one thousand eight hundred and fifty-nine, that being the second judicial day of the May Term of said Court, for the year last aforesaid; come now the plaintiffs, by their said attorneys, and upon their motion, the defendant is ruled to plead on or before the next calling of this cause. And day is given the parties.

And afterwards, to wit, on the twenty-seventh day of May aforesaid, being the tenth judicial day of the May Term of said Court aforesaid, continued and holden at Indianapolis aforesaid, before the Honorable John McLean, one of the Justices of the Supreme Court of the United States, and the Honorable Elisha M. Huntington, District Judge of the United States, for the District of Indiana, comes now the defendant, by her attorneys, and files her demurrer herein, in the words and figures following, to wit:

Demurrer.

And the said defendant, by Stuart & Ross, her attorneys, comes and defends the wrong and injury, when, &c., and says, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same, and this said defendant is ready to verify, wherefore, by reason of the insufficiency of the said declaration, in this behalf, the said defendant prays judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against the said defendant.

ROSS & STUART,
Attorneys for Defendants.

And day is given, &c.

And afterwards, to wit, on the second day of June, in the year last aforesaid, being the fifteenth judicial day of said Court aforesaid, continued and holden at Indianapolis aforesaid, before the Honorable John McLean and the Honorable Elisha M. Huntington aforesaid, come now the parties, and the Court being sufficiently advised, overrule the demurrer to the said declaration. And day is given, &c.

And afterwards, to wit, on the fourth day of June aforesaid,

being the seventeenth judicial day of said May Term of said Court aforesaid, continued and holden at Indianapolis aforesaid, before the Honorable Elisha M. Huntington, Judge aforesaid, come the parties, by their attornies, and the defendant withdraws her said demurrer, and file four pleas herein, in the words and figures following, to wit:

Pleas.

First Plea. And the said defendant, by her attorneys, comes and defends the wrong and injury, when, &c., and says, that she did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against her, and of this she puts herself upon the country. And the plaintiff do the like, &c.

Second Plea. And for a further and second plea in this behalf, the said defendant says, that the said plaintiffs ought not to have or maintain their aforesaid action thereof against her, because she says that the said several supposed bonds, with said several interest warrants attached, were not, nor was either of them, issued by the Board of Commissioners of the County of Miami, at any regular session of said Board, nor did the Auditor call a special session of said Board of Commissioners of said County, by giving to each or either of the Commissioners of said County, composing said Board, a notice thereof in writing, specifying that they were called together to borrow money, or issue bonds, on behalf of said County of Miami, to pay subscription of railroad stock in the Peru and Indianapolis Railroad Company, nor for any purpose whatever, in pursuance of the provisions of the statute in such case made and provided; but on the contrary, she avers, that on the nineteenth day of August, 1851, and in the vacation of said Board, the persons composing the same, voluntarily and without notice, met together, and continued together from day to day, until the twenty-first day of the same month, and that during said meeting they procured the Auditor of said County to enter upon the records of said Board an order for the issue of said bonds and interest warrants, as will more fully appear by the records of said Board; and thereupon, on the day and year last aforesaid, in pursuance of said order so made as aforesaid, and without any further order, or other authority whatever, and for no other consideration or purpose, said supposed bonds and interest warrants were issued by the Auditor of said County, and that the same were not issued at any other time, nor in any other manner, and that both the bonds and interest warrants were and are void in law, and this she is ready to verify, wherefore she prays judgment, &c.

Third Plea. And for a further and third plea in this behalf,

the said defendant says *actio non*, because she says that said bonds and interest warrants were, and each of them was, issued under and by virtue of certain orders of the Board of Commissioners of Miami County, made at a special session thereof, held on the 19th, 20th and 21st days of August, 1851, as in the second plea above alleged, which orders were entered upon the records of said Board, and copies of which are herewith filed and made a part of this plea, and that they were issued for no other or different considerations, nor in pursuance of any other or different orders whatever, and that the same were issued and delivered to the President and Directors of the Peru and Indianapolis Railroad Company, as accommodation paper, and with the view and purpose of lending to the credit of the County in the amount specified in said bonds and warrants to said Railroad Company, and with the understanding and agreement with said Railroad Company, that said bonds and warrants should be paid by said Company, and not by the defendant, as each severally became due, which understanding and agreement was entered of record upon the records of said Board, and became and is part of the order of said Board, authorizing the issue of said bonds and interest warrants, a copy of which agreement is also filed herewith and is made a part of this plea, of all of which the plaintiffs had notice at the time they purchased said bonds and the interest warrants, wherefore the defendant says that said bonds and interest warrants were and are void in law, and create no legal liability against the county, and this she is ready to verify, wherefore she prays judgment, &c.

Fourth Plea. And for the further and fourth plea in this behalf, the said defendant says *actio non*, because she says that at the time of issuing said supposed bonds and interest warrants named in said complaint, and at the time of the delivery thereof to the President and Directors of the Peru and Indianapolis Railroad Company, the defendant had not any *bona fide* subscription to the capital stock of said Company, nor did she propose or purpose to subscribe any such stock, nor was she in any way indebted to said Railroad Company for any railroad stock, nor for any other consideration whatever. But she avers, that at a special session of said Board of Commissioners, convened and holden on the 19th, 20th and 21st days of August, 1851, as more particularly specified in the second plea above pleaded, the President and Directors of the Peru and Indianapolis Railroad Company presented to said Board a proposition in writing, under the seal of said Corporation, that said Board should lend said Company the credit of said county, for the purpose of borrowing the sum of twenty thousand dollars, for the use of said Railroad Company; and that said Board of Commissioners, at said special session so convened as aforesaid, to wit, on the 20th day of

August, 1851, by an order on their records, and for the purpose of lending the credit of said County to said Railroad Company, for the purpose of borrowing said sum of twenty thousand dollars, and for no other purpose whatever, accepted said proposition of said Railroad Company, and with a view and purpose of so lending the credit of the County as aforesaid, directed the subscription of twenty thousand dollars to the capital stock of said Company, on the conditions, covenants and agreements contained in said proposition; and also at the same time, and for the same consideration and purpose, and for no other, ordered and directed the issuing of twenty bonds, of the denomination of "one thousand dollars" each, with interest warrants attached, to said Railroad Company, in compliance with the terms and conditions of said agreement, and delivered the same to said Railroad Company, all of which appears by the records of said Board of Commissioners, a copy whereof is filed herewith and made a part of this plea. And that afterwards, to wit, on the 21st day of August, 1851, twenty bonds of said County, of the denomination of one thousand dollars each, and amounting to the sum of twenty thousand dollars, with interest warrants attached, and numbering from eleven to thirty, both numbers inclusive, were, in pursuance of the orders aforesaid, and without any other authority whatever, and for no other consideration, issued and delivered to said Railroad Company, of which twenty bonds, with interest warrants, the bonds and interest warrants named in the complaint, are a part, of all of which the plaintiffs had notice at the time they purchased said bonds and warrants, wherefore the defendant says that said bonds and warrants were and are void in law, and this she is ready to verify, wherefore she prays judgment, &c.

STUART, ROSS & EFFINGER,
Attorneys for Defendant.

Contract.

Know all men, that I, John Burk, President of the Peru and Indianapolis Railroad Company, do hereby, and by the authority vested in me, by an order of the President and Directors of the aforesaid Company, passed at their July session, 1851, bind and obligate the Company aforesaid to the County of Miami, for the performance of all the stipulations to the letter on the part of said Company, contemplated or indicated by an order of the Board of Directors, providing for an increased subscription to the stock of said Company, by the Board of Commissioners of Hamilton, Howard and Miami, passed on the 31st day of July, 1851, being the third day of the session of said Board of Directors, which order is as follows, to wit:

Ordered that a committee of four consisting of W. J. Holman,

C. D. Murray, John Burk and John D. Stephenson be, and they are hereby appointed to apply to the County Auditor of the counties of Hamilton, Howard and Miami for a call of a special session of the Board of Commissioners of their respective counties as soon as practicable after the adjournment of this Board. At the meeting of the respective Boards upon the call of the auditor, as aforesaid, said committee are further required to apply to said Board for any additional subscription to the stock of the Peru and Indianapolis Railroad Company in the following amounts, to wit: The counties of Hamilton and Miami respectively twenty thousand dollars ($20,000), the county of Howard ten thousand dollars ($10,000), said committee will propose to the several Boards that such subscription will be taken and received upon the following terms, that for the amount taken, they at once issue bonds bearing ten per cent. interest per annum, redeemable at the expiration of ten years with the coupons attached, subject to be called in at the expiration of eight years at the option of the Commissioners. That upon the subscription of the stock of the company and the issue of the bonds as above indicated, the committee aforesaid, shall issue stock of the company, credited in full to such county to the amount of such bonds. The President shall also execute an obligation binding the company to pay the interest annually upon such bonds as such interest shall become due, until the principal of such bonds may become payable, and that when the principal of such bonds shall become payable, that the company pay such principal also; and that when such principal and interest shall have been paid by such Railroad Company, the Board of Commissioners of the counties aforesaid, shall deliver to the authorities of the Railroad Company in exchange for lifted and cancelled bonds, the stock certificates issued at the time of the issue of such county bonds. The obligations above referred to shall provide further that if the counties aforesaid, or either of them shall at any time before the redemption of said county bonds elect to surrender to said company such obligations and assume the payment of the interest that shall accrue after such election, and the principal when the same shall become due and payable on such bonds the stock issued as aforesaid, shall become absolute in favor of such county or counties, they being entitled to all future dividends in such stock, but until such election and assumption of payment of interest and principal of the bonds aforesaid on the part of the aforesaid counties or either of them, that the stock issued in favor of such counties be held and kept as a security merely for the performance of the stipulation on the part of the Railroad Company, not entitling such counties to dividends but allowing them a voice in election for directors from the date of such stock. The obligations to be executed binding this company to the counties aforesaid shall further stipulate, that unless all the coun-

ties herein mentioned, shall subscribe the amount expressed for each respectively the subscriptions on the part of the counties subscribing shall be invalidated by such failure on the part of any one, or more of the counties to take the amount as above expressed. It is further ordered that the Board of Directors will pay all necessary expenses incurred by the counties aforesaid in convincing such Board of Commissioners and issuing such bonds.

To the purpose of which on their part the President and Direc-
[SEAL.] tors are hereby irrevocably pledged.

Railroad Office, Noblesville, August 13, 1851.

JOHN BURK,
President P. & I. R. R. Co.

JOHN COX,
Secretary.

Wednesday, August 20th, 1851.

Ordered, that this Board do hereby accept the propositions contained in the contract, obligation and order of the President and Directors of the Peru and Indianapolis Railroad Company, submitted to this Board on yesterday by Messrs. Holman and Murray, and hereinbefore entered of record, and that this Board do hereby order the sum of twenty thousand dollars be subscribed to the capital stock of the Peru and Indianapolis Railroad Company on the conditions, covenants and agreements expressed in the order and contract of said Railroad Company.

And it is further ordered that twenty county bonds of one thousand dollars each, of the form issued by this Board at their session, on the 10th day of June, A. D. 1851, and entered on the eighty-ninth page of this record, be issued in compliance with the conditions of the aforesaid order of said company.

August 21st, 1851.

This bond issued twenty bonds of the form aforesaid, numbering from eleven to thirty, both numbers inclusive of one thousand dollars each, amounting in the aggregate to twenty thousand dollars.

Replications.

And the plaintiffs filed the similiter to the first plea, and their replications severally to the second, third and fourth pleas of said defendant in the words and figures following, to wit: And the said plaintiffs as to the plea of said defendant by it firstly above pleaded, and whereof it hath put itself upon the country, doth the like, &c.

Replication to Second Plea.—And for replication to the said defendants' second plea, the said plaintiffs say *precludi non, &c.*, because they say that the said several bonds with the said interest

warrants attached, were each and all of them issued by authority of the said Board of Commissioners of the said county of Miami, at a session thereof duly called and convened by the county auditor of said county, at his office in the town of Peru, in said county, on Tuesday, the 19th day of August, A. D. 1851, in obedience to, and in compliance with a mandate duly issued by said auditor, on the 16th day of August, A. D. 1851, under the hand of said auditor and the seal of said Board of Commissioners directed and delivered to the Sheriff of said county, whereby in the name of the State of Indiana, the said Sheriff was commanded to notify Hiram Butler, Samuel Jemeson and Frederick L. Hackly, Commissioners for the said county of Miami, to convene at the said Auditor's office, in said town of Peru, on the said 19th day of August, A. D. 1851, at 12 o'clock noon, to transact business of importance to the interest of said county, connected with the county subscription of stock in the Peru and Indianapolis Railroad Company, &c., which mandate was duly executed by said Sheriff as commanded, and the said Commissioners did afterwards, and in pursuance of said notice convene at the time, and place in the said mandate mentioned, and having so convened did then and there adjourn until the following morning at 10 o'clock, when they met pursuant to adjournment, and did then and there order and direct, amongst other things, that the sum of twenty thousand dollars be subscribed to the capital stock of said Peru and Indianapolis Railroad Company and that twenty county bonds of one thousand dollars each, of the form issued by the Board at their session on the 10th day of June, 1851, and entered on the eighty-ninth page of their record, should be issued, and the said Board then and there adjourned their said meeting until the next following morning, at 9 o'clock, A. M., at which time and place, the said Board met pursuant to adjournment and did then and there issue and order and direct to be issued among other bonds, the bonds with the said interest warrants attached, in the said declaration mentioned, and this the said plaintiff is ready to verify by the record of the proceedings of said Board of Commissioners remaining before the said Board, wherefore the said plaintiff pray judgment, &c.

Replication to Third Plea.—And for replication to the said defendant's third plea, the plaintiffs say *precludi non, &c.*, because they say that at the time of the transfer and delivery to them of the said bonds with the interest warrants attached, they had no knowledge that they or either of them had been issued and delivered to the President and Directors of the Peru and Indianapolis Railroad Company as accommodation paper, as is in the third plea alleged, and of this the plaintiffs put themselves upon the country, and the defendant does the like, &c.

Replication to Fourth Plea.—And for replication to the said fourth plea of the defendant, the plaintiffs say, *actio non, &c.*, because they say at the time of the transfer and delivery to them of the said bonds with the said interest warrants attached, they had no knowledge that the same were issued upon, or for the consideration and purpose in said fourth plea alleged, and of this they put themselves upon the country, and the defendant does the like, &c.

MORRISON & RAY,
Attorneys for Plaintiffs.

And the defendant files demurrers to the said replications severally in the words and figures following, to wit:

Demurrer to Replications.

Demurrer to Replication to Second Plea.—And the said defendant says that the said replication of the said plaintiffs to the said second plea of the said defendant, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same, and this the said defendant is ready to verify, wherefore by reason of the insufficiency of the said replication, in this the said defendant prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against her, &c.

Demurrer to Replication to Third Plea.—And the said defendant demurs to the replication of said plaintiffs, to the said third plea of the said defendant) and says that the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same, and this the said defendant is ready to verify wherefore by reason of the insufficiency of the said replication in this behalf the said defendant prays judgment if the said plaintiff ought to have or maintain their aforesaid action thereof against her, &c.

Demurrer to Replication to Fourth Plea.—And the said defendant demurs to the replication of the plaintiffs to the fourth plea of the defendant, and says that the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant and that the said defendant is not bound by law to answer the same. And this the said defendant is ready to verify, wherefore by reason of the insufficiency of the said replication in this behalf the said

defendant prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against her, &c.

STUART, ROSS & EFFINGER,
Attorneys for Defendant.

And the plaintiffs join in demurrer, and day is given the parties.

And afterwards, to wit: At the November Term of said Court begun, holden, and continued at Indianapolis, in said District aforesaid, before the Honorable Elisha M. Huntington, Judge aforesaid, to wit, on the 21st day of November, in the year aforesaid, that being the first judicial day of said November Term aforesaid, come now the plaintiffs, by their attorneys, and upon their motion they have leave to withdraw their joinder in demurrer and amend their replications herein, and day is given the parties.

And afterwards, to wit, on the twenty-sixth day of November, in the year aforesaid, that being the sixth judicial day of the November Term of said Court aforesaid, begun, holden, and continued before the Judge aforesaid, come the plaintiffs, by their attorneys, and on their motion, they have leave to withdraw their joinders in demurrer of the defendants to the replications of the plaintiffs to the defendant's third and fourth pleas, and to withdraw their said replication to said third and fourth pleas, and to file one replication to said pleas, which they now do, in the words and figures following, to wit:

And the said plaintiffs for replication to the said pleas of the defendant by her, thirdly and fourthly above pleaded say, *precludi, non, &c.*, because they say, that it was and is in and by the orders of said Board of Commissioners of said County of Miami, in the said third and fourth pleas mentioned amongst the things ordered, that twenty thousand dollars should be subscribed in behalf of said county to the capital stock of the said Peru and Indianapolis Railroad Company, and that twenty bonds of the said county, of "one thousand dollars each, of the form issued by said Board, at their session held on the 10th day of June, A. D. 1851, should be issued and delivered to the said Railroad Company, in consideration of and in payment for the said stock so ordered to be subscribed, said bonds to be delivered to the agent of said company, whenever stock of the said company credited in full to the amount of $20,000 should be placed in the hands of the County Auditor of said County for said County.

And the said Board thereupon then, and there, issued twenty bonds of the said county, of the form aforesaid, numbering from 11 to 30 inclusive, of $1000 each, amounting in the aggregate to $20,000, and then and there by the said before-mentioned orders of the said Board, ordered and directed the said County Auditor to retain the same in his office in the stock of said company,

credited in full to the amount of $20,000, should be placed in the hands of the said Auditor for the County, all which will more fully and at large appear by the said orders and proceedings of said Board, remaining of record before the said Board, unreserved and in full force. And the plaintiff further say, that afterwards, viz., on, &c., at, &c., aforesaid, in compliance with the condition on that subject, contained in said orders of the Board, the said Railroad Company caused to be issued, and placed in the hands of the Auditor of said County, for said County, stock of said company, credited in full to the amount of $20,000, that is to say, a paper writing commonly called a stock certificate, duly executed, and in the usual form certifying that the said County of Miami was the owner of four hundred shares in the capital stock of the said Railroad Company, which was then and there received by the said auditor for, and in behalf of said county, in compliance with the condition on that subject, and thereupon the said auditor for, and in behalf of said county, and in pursuance of the before-mentioned orders of the said Board, paid over, and delivered the said bonds, with the said interest warrants annexed, to the proper agent of the said Railroad Company for said company, which company afterwards, viz., on, &c., at, &c., as aforesaid, for a fair and valuable consideration sold, and transferred to the plaintiffs, fifteen of the said bonds, being those in the declaration described, the plaintiffs purchasing the same in the confidence that the consideration of the bonds was what is expressed on their face.

And the plaintiffs further say, that ever since the said subscription by said county, to the said capital stock of said company, and the delivery to the said auditor of said stock certificate, the said county has owned, and retained, and does now own and retain the said stock and stock certificate, and under, and in virtue of said ownership and retention, has exercised the rights and privileges of a stockholder in said company, and has rated such stock as such stockholder, at the various annual elections for Directors of said company, wherefore the said plaintiffs say, the defendant is estopped from alleging that the said bonds were merely a loan to the company of the credit of the county, and were without consideration, and are illegal and void, and this the plaintiffs are ready to verify, wherefore they pray judgment, &c.

MORRISON & RAY,
Attorneys for Plaintiffs.

And thereupon the defendant is ruled to rejoin to said replication by Tuesday morning next, and day is given, &c.

And afterwards, to wit, on the 2d day of December, in the year aforesaid, being the eleventh judicial day of said November Term aforesaid, begun, holden, and continued before the Honorable Judge aforesaid, come the parties by their counsel, and the defendant files rejoinder to replication to second plea, and a rejoin-

der to replication in the third and fourth pleas, in the words and figures following, to wit:

Rejoinder to Replication to Second Plea.—And the said defendant as to the said replication of the said plaintiffs to the second plea of the said defendant, saith, that the said plaintiffs ought not by reason of anything by them in that replication alleged, to have or maintain their aforesaid action thereof against her, because she says, that before the issuing of the mandate in the said replication mentioned, to wit, on the 27th day of October, 1849, the Board of Commissioners of Miami County on behalf of said county, and by an order upon the records of said Board duly entered, had taken and subscribed to the capital stock of the President and Directors of the Peru and Indianapolis Railroad Company, the sum of twenty thousand dollars, and that said mandate so issued, and served upon said Hiram Butler, Samuel Jemeson and Frederick S. Hackley, the Commissioners of said County of Miami, as alleged in said reply, specified and required said commissioners to meet at the time and place therein named, to wit, at the Auditor's Office in the Town of Peru, on the 19th day of August, 1851, at 12 o'clock noon, to transact business of importance to the interest of said county, connected with the said subscription of stock so made as aforesaid, and not to make a new subscription to the capital stock of said Railroad Company, and issue bonds, or in any other way provide for the payment thereof, as in said replications is alleged, and without this that said bonds were issued as in said reply is alleged, and this said defendant is ready to verify by the records of the proceedings of said Board of Commissioners, now remaining of record before the Board.

Rejoinder to Replication to Third and Fourth Pleas.—And the said defendant as to the said replication of the said plaintiffs to the third and fourth pleas of the said defendant, saith, that the plaintiffs ought not by reason of anything by them in that replication alleged, to have or maintain their aforesaid action thereof against her, because she saith, that before the making of the said orders in said replication mentioned by the said Board of Commissioners, to wit, on the 19th day of August, 1851, and when said Board were convened, as in said third and fourth pleas mentioned, the said Railroad Company applied to said Board for a loan of the credit of the county to said Railroad Company to borrow the sum of twenty thousand dollars, as in said pleas alleged, which proposition of said Railroad Company, was made in writing and was spread upon the record of the proceedings of said Board, and that said twenty thousand dollars ordered to be subscribed to the capital stock of said Railroad Company, as in said replication mentioned, was ordered to be subscribed, and said twenty bonds of said County of Miami, of "one thousand

dollars each," so ordered to be issued, and delivered to said Railroad Company, in consideration of and in payment for the said stock so ordered to be subscribed as aforesaid, were ordered to be issued and delivered, and were issued and delivered for the express purpose of lending the credit of said County of Miami to said Railroad Company, to borrow money for the purposes of said Railroad Company, and not as a *bona fide* subscription, nor for any other or different purpose whatever. And said defendant further saith, that said certificate of stock for twenty thousand dollars of the capital stock of said Railroad Company, certifying that said County of Miami was the owner of four hundred shares of said capital stock as in replication is alleged, was not delivered to the Auditor of said County, as an absolute delivery of so much of the stock of said company to said county, but that it was delivered to said auditor in pursuance of the proposition made to said Board by said Railroad Company, and the acceptance thereof by said Board, to be held and kept, and was by said auditor held and kept as a security merely for the performance on the part of said Railroad Company of their agreement to pay the principal and interest on said bonds so issued as aforesaid by said county, as the same respectively become due, and to secure the county against any loss which said county might sustain on account of said loan of their credit to said Railroad Company as aforesaid, and that by virtue of said agreement of said Railroad Company with said Board of Commissioners, said county was authorized to vote for Directors of said Company, but was not entitled to any portion of the dividends of the earnings of said Railroad Company, or any other of the privileges or rights of the stockholders thereof, and that upon the final payment of said bonds with all the interest therein so issued as aforesaid, the said stock certificate so delivered to said auditor as aforesaid, should be delivered up to said Railroad Company, of all which, the plaintiffs at and before the time they purchased said bonds had notice, and this the defendant is ready to verify, wherefore she prays judgment, &c.

STUART, ROSS & EFFINGER,
Attorneys for Defendant.

Pleas.

Fifth Plea.—And also files her fifth and sixth pleas herein, in the words and figures following, to wit: And for a further and fifth plea in this behalf, the said defendant saith, that said bonds in said declaration mentioned, and each of them, were given without any consideration whatever, and were, and are void in law, and this she is ready to verify, wherefore she prays judgment, &c.

Sixth Plea.—And for a further and sixth plea in this behalf, the defendant says, *actio non*, because she says, that at and before

the issuing and delivery of the bonds in the declaration mentioned, the President and Directors of the Peru and Indianapolis Railroad Company, made, and entered into an agreement in writing with the Board of Commissioners of the said County of Miami, of the tenor and effect following, that is to say, that said Board of Commissioners should cause to be issued twenty bonds of the said county, of the size and denomination of one thousand dollars each, and of the tenor and effect, and to become due and payable at the time and place named in the bonds, declared on in said declaration, which were to be delivered to said Railroad Company, upon the issue and delivery to the Auditor of said County, of the stock of said company, to that amount credited in full, to be held and kept by him, as a security for the performance, on the part of the said Railroad Company, of the stipulations hereinafter named. And the said President and Directors of the Peru and Indianapolis Railroad Company, on their part agreed, and obligated themselves, as the inducement and consideration for the issue and delivery of said bonds to said company, to issue and deliver to said defendant, to be held as a security merely for the performance on the part of said company, of the stipulations hereinafter named, a certificate of the stock of said Railroad Company, credited in full to the amount of said bonds, which certificate would entitle said defendant to vote for Directors for said Company, but would not entitle her to receive any share, or portion of the dividends, which from time to time might be made among the stockholders, of the earnings of said road, nor to have, or enjoy, any other of the rights and privileges of a stockholder in said company. And that it was further stipulated and agreed, on the part of said Railroad Company, that said company would pay all interest upon said bonds, as the same became due, and the principal thereof when it became due, which agreement said defendant says, was spread at full length on the record of the proceedings of said Board; and that said Board ordered, directed and authorized the Auditor of said County, to issue said bonds, in pursuance of the terms and stipulations of said agreement, and for the purpose and consideration therein named and agreed upon, and for no other or different consideration whatever. And that said bonds were afterwards issued and delivered to said Railroad Company, by the Auditor of said County, in pursuance of said orders of said Board of Commissioners of Miami County, for the purpose and consideration in said agreement named, and not for any other or different consideration whatever, of which bonds so issued and delivered, the bonds declared on in the declaration are a part, and that said Railroad Company issued, and delivered to said defendant, a certificate of the stock of said Railroad Company, to the amount of said bonds, to be held as a security for the payment by said Railroad Company of said bonds, and the interest thereon, as stipulated in said agreement, of all of which, the

plaintiffs, at and before they become the owners of said bonds, had notice. And the defendant avers, that said Railroad Company had no power to issue and hypothecate the stock of said company for the purposes hereinbefore named, and that said stock so issued, and delivered to said Auditor of Miami County, was, and is fraudulent and void, and of no value whatever, wherefore said defendant says, that said bonds, and each of them, were given without any consideration, and were, and are void in law, and created no legal liability against said defendant, and this she is ready to verify, wherefore she prays judgment, &c.

STUART, ROSS & EFFINGER,
Attorneys for Defendant.

And thereupon, plaintiffs move to reject the sixth plea, and after argument, the Court being sufficiently advised, overrule said motion, and the plea is allowed to stand, and day is given the parties.

Replication.

And afterwards, to wit, on the 5th day of December, in the year aforesaid, being the fifteenth judicial day of the November Term of said Court aforesaid, begun, holden and continued, before the Honorable Judge aforesaid, come the plaintiffs, by their attorneys, and file replication to fifth and sixth pleas herein, and sur-rejoinders to the defendant's rejoinders to the plaintiffs' replications to the third and fourth pleas, and sur-rejoinder to the rejoinder of defendant's to plaintiffs' replication to the defendant's second plea, in the words and figures following, to wit:

And the said plaintiffs, as to the said defendant's fifth plea, says, *precludi non*, &c., because they say, that the said bonds in the declaration mentioned, were given for a good and sufficient consideration, and this they pray may be enquired of by the county, and the defendant does the like, &c.

MORRISON & RAY,
Attorney for Plaintiffs.

And the plaintiffs say, that the said defendant ought not to be admitted or received to plead the said plea by it sixthly above pleaded, as to so much thereof, wherein it is alleged that, at and before the issuing and delivery of the bonds in the declaration mentioned, the President and Directors of the Peru and Indianapolis Railroad Company made and entered into an agreement in writing with the Board of Commissioners of said county of Miami, of the tenor and effect following, that is to say, that said Board of Commissioners should cause to be issued twenty bonds of said county, of the size and denomination of one thousand dollars each, and of the tenor and effect, and to become due and payable at the time and place named in the bonds declared on in

said declaration, which were to be delivered to said Railroad Company upon the issue and delivery to the Auditor of said county of the stock of said Company to that amount credited in full, to be held and kept by him as a security for the performance, on the part of the Railroad Company, of the stipulations hereinafter named; and the said President and Directors of the Peru and Indianapolis Railroad Company, on their part, agreed and obligated themselves, as the inducement and consideration for the issue and delivery of said bonds to said Company, to issue and deliver to said defendant, to be held as a security merely for the performance, on the part of said Company, of the stipulation hereinafter named, a certificate of the stock of said Railroad Company, credited in full, to the amount of said bonds, which certificate would entitle said defendant to vote for directors of said Company, but would not entitle her to receive any share or portion of the dividends which from time to time might be made among the stockholders of the earnings of said road, nor to have nor enjoy any other of the rights and privileges of a stockholder in said Company. And that it was further stipulated and agreed, on the part of said Railroad Company, that said Company would pay all interest upon said bonds as the same became due, and the principal thereof when it became due, and that said agreement was spread at full length on the record of the proceedings of said Board, and that said Board ordered, directed and authorized the Auditor of said county to issue said bonds in pursuance of the terms and stipulations of said agreement, and for the purpose and consideration therein named, and agreed upo) and for no other or different consideration whatever, and that said bonds were afterwards issued and delivered to said Railroad Company by the Auditor of said county, in pursuance of said orders of said Board of Commissioners of Miami county, for the purpose and consideration in said agreement named, and not for any other or different consideration whatever, of which bonds so issued and delivered the bonds declared on in the declaration are a part; and that said Railroad Company issued and delivered to said defendant a certificate of the stock of said Railroad Company to the amount of said bonds, to be held as a security for the payment by said Railroad Company of said bonds and the interest thereon, as stipulated in said agreement, because said plaintiffs say, that at and before the issuing and delivering of bonds in the declaration and the said sixth plea mentioned, to wit, on the nineteenth day of August, 1851, at a meeting of the said Board of Commissioners of said county of Miami, duly convened and assembled at the Auditor's office in the town of Peru in said county, by the order and summons of the said Auditor, pursuant to the statute of the said State of Indiana in such cases made and provided, the said Peru and Indianapolis Railroad Company, by their agents for that purpose,

then and there applied to said Board for and requested said Board to make, on behalf of said county, an additional subscription to the capital stock of said Railroad Company to the amount of twenty thousand dollars, and that for such subscription and on consideration thereof the said county should at once issue the bonds of said county to that amount, and that upon such subscription and the issue of such bonds the said Company would issue to said county stock of the said Company, credited to said county in full, to the amount of said bonds; and it was therefore then and there ordered and directed by the said Board by an order in writing duly entered upon the records of the said Board, that the sum of twenty thousand dollars should be subscribed to the capital stock of the said Railroad Company; and it was then and there further ordered by the said Board, and recorded in the said records, that twenty bonds of one thousand dollars each, of the form issued by said Board at their session on the tenth day of June, 1851, and entered on the eighty-ninth page of their said record, should be issued to said Company as requested by said Company; and the Board then and there issued the said twenty bonds of the said county, numbering from eleven to thirty inclusive, of one thousand dollars each, amounting in the aggregate to twenty thousand dollars, the said bonds in the declaration mentioned being a part thereof; and it was then and there further ordered and directed by said Board, by their said order so as aforesaid entered on their record, that the said Auditor should retain said bonds in his office until the stock of said Company, credited in full to the amount of $20,000, should be placed in his hands for said county; whereupon said Auditor was by said order of said Board, so entered of record, authorized and directed to pass said bonds to the committee of the said Company producing said stock certificate to said Auditor, all which will more fully and at large appear by the proceedings and record aforesaid; and this the said plaintiffs are ready to verify by the said record remaining before the said Board unreversed and in force.

And the plaintiffs aver, that the said subscription of $20,000, to the capital stock of said Company, was thereupon then and there made by and on behalf of the said county of Miami, and the said bonds in the said plea and declaration mentioned were issued by said county and delivered to the said Peru and Indianapolis Railroad Company, in pursuance of and under and in virtue of the power and authority granted and conferred by the said orders of the said Board of Commissioners at their said session, so as aforesaid commenced, and held at Peru aforesaid on the said 19th day of August, 1851, and under no other power or authority or any other contract or agreement; and that the said stock certificate mentioned in said plea was issued to said county and delivered to said County Auditor for said county, under and

in virtue of the same authority and under no other authority, contract or agreement. That the said Peru and Indianapolis Railroad Company, mentioned in the said proceedings and record, is the same railroad company mentioned in said plea and declaration. That the said Board of Commissioners of Miami county, in said record and proceedings mentioned, is the same Board in the declaration and plea mentioned, and which Board is the defendant in this suit. That the said bonds, in the said record and proceedings mentioned, are the same mentioned in the said declaration and plea, and that the said subscription and stock mentioned in said record and proceedings are the same mentioned in said plea; and this the plaintiffs are ready to verify. Wherefore the plaintiffs pray judgment, whether the defendant ought to be admitted against the said proceedings and record and against its own acts and acknowledgments as aforesaid, to aver or plead the said supposed agreement in writing of the Peru and Indianapolis Railroad Company with the said Board of Commissioners in the said plea mentioned, or that the said Board named directed and authorized the Auditor of said county to issue said bonds in pursuance of the terms and stipulations of said supposed agreement, and for no other consideration; or that said bonds were afterwards issued and delivered to said Railroad Company by the Auditor of said county, in pursuance of the said order of the Board in that plea mentioned, for the purpose and consideration in said supposed agreement named; or that the said Railroad Company issued and delivered to the said defendant a certificate of the stock of said Railroad Company to the amount of said bonds, to be held as a security for the payment of said Railroad Company of said bonds and the interest thereon, as stipulated in said supposed agreement; or that the said Railroad Company had no power to issue or hypothecate the stock of said Company; or that the said stock so issued and delivered to said Auditor of Miami county was and is fraudulent and void, and that said bonds were given without consideration, were and are void in law.

And as to so much of said plea, wherein it is averred that the said plaintiffs, at and before the time they became the owners of said bonds, had notice of all which is averred in said plea, the said plaintiffs say they had no such notice, and of this they put themselves upon the country, and the defendant does the like, &c.

MORRISON & RAY,
Attorneys for Plaintiffs.

Sur-rejoinders.

And the said plaintiffs say that the said defendants ought not to be admitted, or received to plead, the said rejoinder by it pleaded to the replication of the said plaintiffs to the said third plea, and fourth pleas of the defendant, as to so much of the said

rejoinder wherein the defendant alleges, that when said Board was convened, as in said third and fourth pleas mentioned, the said railroad company applied to said board for a loan of the credit of the county, to borrow the sum of twenty thousand dollars, as in said pleas alleged, and that the proposition was made in writing, and was spread upon the record of the proceedings of said board, and that said twenty thousand dollars ordered to be subscribed to the capital stock of said railroad company, as in said replication mentioned, was ordered to be subscribed, and said twenty bonds of the said county of Miami, of one thousand dollars each, so ordered to be issued and delivered to said railroad company, in consideration of and in payment for the said stock so ordered to be subscribed, as aforesaid, was ordered to be issued and delivered for the express purpose of lending the credit of the said county of Miami, to said railroad company, to borrow money for the purposes of said railroad company, and not as a *bona fide* subscription, and that the said certificate of stock for twenty thousand dollars, of the capital stock of said railroad company, certifying that the said county of Miama was the owner of four hundred shares of the said capital stock, as in said replication alleged, was not delivered to the auditor of said county, as an absolute delivery of so much of the said stock of said company to said county, but that it was delivered to said auditor in pursuance of the proposition made to said board by said railroad company, and the acceptance thereof by said board, to be held and kept, and was by said auditor held and kept, as a security merely, for the performance on the part of the said railroad company of their agreement to pay the principal and interest on said bonds so issued as aforesaid, by said county, as the same became due, and to secure the county against any loss which said county might sustain on account of said loan of their credit to said railroad company, as aforesaid, and that upon the final payment of said bonds, with all the interest thereon so issued as aforesaid, the said stock certificate so delivered to the said auditor as aforesaid, should be delivered up to the said railroad company, because the plaintiffs say, that at the meeting of the said Board of Commissioners of the said county of Miami, held on the said 19th day of August, 1851, in the said rejoinder, and replication mentioned, and when the said board was convened as therein, and in the said third and fourth pleas, and in the said rejoinder mentioned, the said railroad company, by its agents, presented to said board so convened on application from said company for an additional subscription to be made by and on behalf of said county, to the capital stock of said company, to the amount of twenty thousand dollars, as mentioned in said replication; and that for the said amount, the said board should at once issue to said company, bonds of the said county to that amount, as mentioned in said replication, and that upon such subscription,

and the issue of said bonds, the said company would issue stock of the said company to said county, credited in full to said county, to the amount of said bonds; and said railroad company then and there, by their said agents, accompanied their said application by a bond to said county, executed by their president and agent, John Burk, conditioned amongst other matters, to comply with the terms and conditions of the said application on the part of the said company to be complied with, whereupon the said board then and there, by their order, entered upon the record of their proceedings, ordered that the said sum of twenty thousand dollars should be subscribed on behalf of said county, to the capital of said company, and that twenty bonds, of one thousand dollars each of said county, should be issued in payment for such subscription, and that the auditor of said county should retain said bonds in his office, until there should be placed in his hands, twenty thousand dollars of the stock of said company, credited in full, to said county, to the amount of $20,000; all of which will more fully and at large appear by the record, and proceedings of the said Board of Commissioners, at their said meeting held as aforesaid, on &c., at &c., aforesaid, as is in the said replication of the plaintiffs, to the said third and fourth pleas of the defendants mentioned; and this the said plaintiffs are ready to verify by the said record, and proceedings of the said board, remaining before the said board, unreversed, and in full force.

And the plaintiffs aver, that the said Peru and Indianapolis Railroad Company, named in the proceedings and record of the said board, at their said meeting, held on the said 19th day of August, 1851, are the same company named in the said defendants' pleas and rejoinders to the replication to said third and fourth pleas; and that the said Board of Commissioners of Miami County, in the said proceedings and record mentioned, is the same identical Board of Commissioners sued in this suit, and that the said bonds of the said county mentioned in the said proceedings and record, are the same that are mentioned and described in the said third and fourth pleas, and in the said plaintiffs' replication thereto, and in the said rejoinder, and that the said subscription to the capital stock of said company named in the same proceedings and record, are the same subscription and capital stock mentioned and referred to in said pleadings, and this the plaintiffs are ready to verify, wherefore the plaintiffs pray judgment whether the defendants ought to be admitted against the said proceedings, and record, and against its own acts and acknowledgements aforesaid, to aver that the application of the said railroad company at said meeting of the Board of Commissioners, to said Board, was for a loan of the credit of said county, to said railroad company, to borrow twenty thousand dollars, or to aver that the said bonds of the said county were issued and delivered to the said railroad company, and the said stock certifi-

cate for four hundred shares of the said capital stock of said company, was delivered to the authorized agent of the said county, by said railroad company, for the express purpose of lending the credit of said county of Miami to said railroad company, and not as a *bona fide* subscription; or that the said stock certificate for four hundred shares of the capital stock of said company so issued by said company to said county, was not delivered to the auditor of said county absolutely, but in security merely for the performance on the part of the said railroad company of their agreement to pay the principal of said bonds as they should become due, and to secure the said county against any loss that said county might sustain on account of said loan of their credit to said railroad company.

And as to so much of the said rejoinder wherein it is alleged that the said plaintiffs, at and before the time they purchased said bonds, had notice of all which as averred in said rejoinder, the plaintiffs say they had no such notice, and this they pray may be inquired of by the country, and the defendant does the like, &c.

MORRISON & RAY,
Attorneys for Plaintiffs.

Surrejoinder of *nul tiel* record to rejoinder to replication to 2nd Plea.—And as to the said rejoinder of the said defendant to the replication of the plaintiffs to the second plea of the defendant, the said plaintiffs say *precludi non*, because they say that there is no such record of the said Board of Commissioners of the said county of Miami, remaining before said board as is in said second plea alleged, and this the plaintiffs pray may be inquired of by the Court now here. And the defendant does the like, &c.

MORRISON & RAY,
Attorneys for Plaintiffs.

And afterwards, to wit, on the seventh day of December, in the year aforesaid, being the fifteenth judicial day of said term of said Court aforesaid, began, holden, and continued before the Honorable Judge, aforesaid, came the parties by counsel, and the plaintiffs file a demurrer, to the surrejoinder to the rejoinder to replication to third and fourth pleas, and a demurrer to replication to sixth plea, in the words and figures following, to wit:

Demurrer to surrejoinder to rejoinder to replication to 3.d and 4th pleas.—And the said defendant saith that the said surrejoinder of the said plaintiffs to the rejoinder of the said defendant to the replication of the said plaintiffs to the third and fourth pleas of said defendant, and the matters therein contained in manner and form, as the same are above pleaded and set forth, are not sufficient in law for the said plaintiffs to have, or to maintain their

aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same, and this the said defendant is ready to verify; wherefore, by reason of the insufficiency of the said surrejoinder in this behalf, the said defendant prays judgment if the said plaintiffs ought to have, or maintain their aforesaid action thereof against her, &c.

Demurrer to replication to 6th plea.—And the said defendant saith that the said replication of the said plaintiffs to the said sixth plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against the said defendant; and that the said defendant is not bound by law to answer the same; and this the said defendant is ready to verify. Wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against her, &c. And day is given the parties, &c.

STUART, ROSS & EFFINGER,
Att'ys for Dft.

And afterwards, to wit, on the eighth day of December, in the year aforesaid, being the said sixteenth judicial day of said term of said Court aforesaid begun, holden and continued, before the Honorable Judge aforesaid, come the parties by counsel, and thereupon the plaintiffs file joinder in demurrer to plaintiffs' surrejoinder to defendant's rejoinder to plaintiffs' replication to defendant's third and fourth pleas and joinder in demurrer to plaintiffs' replication to defendant's sixth plea, in the words and figures following, to wit:

Joinder in demurrer to surrejoinder, &c., to 3d and 4th pleas.—And the said plaintiffs say, that the said surrejoinder of the plaintiffs to the rejoinder of the defendant to the replication of the plaintiffs to the third and fourth pleas of the defendants, and the matters therein contained, in manner and form, &c., are sufficient in law for the plaintiffs to have and maintain their aforesaid action, and that the defendant is bound by law to answer the same.

MORRISON & RAY,
Att'ys for Pl'ffs.

Joinder in demurrer to replication to 6th plea.—And the plaintiffs say that the replication of the plaintiffs to the sixth plea of the defendant, and the matters therein contained, in manner and form, &c., are sufficient in law for the plaintiffs, to have and

maintain their aforesaid action, and that the defendant is bound by law to answer the same.

MORRISON & RAY,
Att'ys for Plaintiff.

And after hearing a portion of the arguments of counsel upon demurrers, this cause is contained until to-morrow morning for further hearing. And day is give the parties, &c.

And afterwards, to wit: on the 9th day of December in the year aforesaid, being the seventh judicial day of said term of said Court aforesaid begun, holden and continued before the judge aforesaid. Come the parties by counsel, and after hearing the concluding arguments of counsel upon the demurrers the Court take the same under advisement. And day is given, &c.

Order of Court.

And afterwards, to wit: on the 7th day of January in the year of our Lord one thousand eight hundred and sixty, being the forty-second judicial day of said term aforesaid, begun, holden and continued before the honorable Judge aforesaid. Come the said parties by their attorneys and the Court being sufficiently advised of the demurrers of the defendant heretofore argued and submitted it seems to the Court that the surrejoinder of the plaintiffs to the rejoinder of the defendant to the replication of the plaintiffs to the third and fourth pleas of the defendant is insufficient in law to sustain the action of the plaintiffs, and the Court accordingly sustains the said demurrer thereto to which decision of the Court sustaining the said demurrer the plaintiffs by their counsel except and file their bill of exceptions in the words and figures following, to wit:

Be it remembered that now on this day of the term of said court the Court sustained the demurrer of the defendant to the surrejoinder of the plaintiffs to the rejoinder of the defendant to the replication of the plaintiffs to the third and fourth pleas of the defendant, to which opinion and decision of the Court the plaintiffs now here by their counsel, except and pray that this their bill of exceptions be signed, sealed and made a part of the record, which is done.

E. M. HUNTINGTON. [SEAL.]

And it also, seems to the Court that the replication of the plaintiffs to the sixth plea of the defendant is also insufficient to sustain the action of plaintiffs and the Court accordingly sustains the said demurrer thereto, to which decision of the Court sustaining the said last named demurrer the plaintiffs by their counsel except and file their bill of exceptions in the words and figures following, to wit:

Bill of Exceptions.

Be it remembered that now on this day of the term of the said court the Court sustained the demurrer of the defendant to the replication of the plaintiffs to the sixth plea of the defendant to which opinion and decision of the Court sustaining said demurrer, the plaintiffs by their counsel now here except, and pray that this their bill of exceptions be signed, sealed and made a part of the record, which is done.

E. M. HUNTINGTON, [SEAL.]

It is therefore considered by the Court, that the plaintiffs take nothing by their said suit, and that the defendant go hence thereof, without day, and recover of the plaintiffs her costs and charges in that behalf expended, taxed at dollars and cents, and the plaintiffs in mercy, &c., to which said judgment of the Court the plaintiffs also except, and file their bill of exceptions, in the words and figures following, to wit:

Be it remembered that, on this day of the term of said Court, the Court gave final judgment against the plaintiffs, in favor of the defendant, that the defendant go hence without day, and recover of the plaintiffs her costs and charges in that behalf expended, and that the plaintiffs should be in mercy, &c., to which judgment of the Court the plaintiffs now here, by their counsel, except and pray that this, their bill of exceptions, "be signed, sealed and made a part of the record," which is done.

E. M. HUNTINGTON, [SEAL.]

And afterwards, to wit: on the thirteenth day of January, in the year last aforesaid, before the Honorable Judge aforesaid, being the forty-seventh judicial day of said November Term of said Court aforesaid, come now the plaintiffs, by their counsel, and file a bond for writ of error, in the words and figures following, to wit:

Bond for Writ of Error.

"Know all men by these presents, that we, James Morrison and Charles A. Ray, of Indianapolis, in the State of Indiana, are held and firmly bound to the Board of Commissioners of the County of Miami, in the penal sum of two hundred dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators, and each and every of them, severally and jointly, firmly by these presents, dated this 13th day of January, A. D. 1860."

The condition of the above obligation is such that, if Charles Moran, Theodore T. Moran and Daniel E. Moran, citizens of the

State of New York, who are suing out a "Writ of Error" to the Supreme Court of the United States, from a judgment of the Circuit Court of the United States, for the District of Indiana, rendered against them in favor of the said Board of Commissioners, at the November Term, 1859, shall prosecute their said suit to effect, and answer, to the defendant in error, all damages and costs, if the said plaintiffs in error fail to make good their plea, then the above obligation to be void, else to remain in full force.

JAMES MORRISON, [SEAL.]
CHARLES A. RAY. [SEAL.]

Approved, January 13, 1860.

E. M. HUNTINGTON, *Judge.*

And afterwards, to wit: on the 13th day of January aforesaid a "writ of error was filed in said cause, in the words and figures following, to wit:'

Copy of Writ of Error.

United States of America, *ss.*

The President of the United States of America, to the Judge of the Circuit Court of the United States for the seventh circuit and District of Indiana, greeting:

Because, in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said Circuit Court, before you, between Charles Moran, Theodore T. Moran and Daniel E. Moran, and the said Board of Commissioners of the County of Miami, a manifest error hath happened, to the great damage of the said Charles Moran, Theodore T. Moran and Daniel E. Moran, as by their complaint appears, and it being fit that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be then given, that then and under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States shall be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this [SEAL.] thirteenth day of January, in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States the 84th year.

H. BASSETT, *Clerk,*
Per JOHN H. REA.

A copy of which "writ of error" was filed at the Clerk's office of said Court endorsed on the back, as follows, to wit: "Copy of writ of error lodged in pursuance of the statute of the United States in such case made and provided for the above named Board of Commissioners of Miami County, defendant in error."

MORRISON & RAY,
Attorneys for the Plaintiffs in Error.

And whereupon, on the same day, a citation was made out and signed by the Judge, in the words and figures following, to wit:

Copy of Citation and Service.

United States of America, *ss.*

To the Board of Commissioners of the County of Miami, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to a "writ of error" filed in the Clerk's office of the Circuit Court of the United States for the Seventh Circuit and District of Indiana, wherein Charles Moran, Theodore T. Moran and Daniel E. Moran are plaintiffs, and you, the Board of Commissioners of the County of Miami, are defendants in error, to show cause, if any there be, why the judgment in the said "writ of error" mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elisha M. Huntington, a Judge of the said Circuit Court, this thirteenth day of January, in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States the 84th year.

[SEAL.]

E. M. HUNTINGTON.

Which said citation was delivered to the Marshal of said District, and afterwards by him duly returned to this office, with the following endorsement thereon, to wit: "Served the within as commanded, on Eathan A. Dennison, Nathaniel Nicholson and Allen Skillman, Commissioners of the County of Miami and State of Indiana, by reading and copy delivered into each of their hands, in Miami County, Indiana, on the 28th day of January, 1860.

"JOHN L. ROBINSON, *Marshal*,
"By SAMUEL BARBOUR, *Deputy*."

Certificate.

United States of America, }
District of Indiana, } *ss.*

I, Horace Bassett, Clerk of the Circuit Court of the United States in and for the District of Indiana, do hereby certify that the foregoing is a true copy of the record, and of all the proceedings in the cause, in a suit in said Court wherein Charles Moran, Theodore Moran, and Daniel E. Moran were plaintiffs, and the Board of Commissioners of the County of Miami was defendant,

In testimony whereof I have hereunto set my hand.

[SEAL.] and affixed the seal of said Court at Indianapolis, this 11th day of February, A. D. 1860.

HORACE BASSETT, *Clerk*,
Per JNO. H. REA.

Original Writ of Error.

United States of America, *ss.*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Seventh Circuit and District of Indiana, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said Circuit Court, before you, between Charles Moran, Theodore T. Moran, and Daniel E. Moran, and the Board of Commissioners of the County of Miami, a manifest error hath happened, to the great damage of the said Charles Moran, Theodore T. Moran, and Daniel E. Moran, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be then given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this thirteenth day of January, in year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fourth year.

H. BASSETT, *Clerk*,
per JNO. H. REA.

Original Citation and Service.

United States of America, *ss.*

To the Board of Commissioners of the County of Miami, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Seventh Circuit and District of Indiana, wherein Charles Moran, Theodore T. Moran, and Daniel E. Moran are plaintiffs, and you, the Board of Commissioners of the County of Miami, are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elisha M. Huntington, a Judge of the said Circuit Court, this thirteenth day of January, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fourth year.

E. M. HUNTINGTON.

[Endorsed.]

Served the within, as commanded, on Eathan A. Dennison, Nathaniel Nicholson, and Allen Skilman, Commissioners of the County of Miami, and State of Indiana, by reading and copy delivered into each of their hands, in Miami county, Indiana, on the 28th day of January, 1860.

JOHN L. ROBINSON, *Marshal*,
By SAML. BARBOUR, *Deputy*.

Service and copy on 3,	$9 00
Railroad fare,	5 00
Time and livery,	8 50
Hotel,	4 50
Return,	10
	$27 10

We, attorneys of record in the Court below for the defendants, admit due service of the within citation on defendants, and consent to appear as cited.

Indianapolis, 30th May, A. D. 1860.

WILLIAM Z. STUART,
N. O. ROSS,
Att'ys for Def'ts.

WILLIAM A. GILENEY.

Assignment of Errors.

In the Supreme Court of the United States:

Charles Moran, Theodore Moran, and Daniel E. Moran
vs.
The Board of Commissioners of the County of Miami.
} In Error.

Afterwards, to wit, on the first Monday of December, A. D. 1860, before the Justices of the Supreme Court of the United States, at the city of Washington, come the said Charles Moran, Theodore Moran, and Daniel E. Moran, by David McDonald, his attorney, and say that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this, to wit: that by the record aforesaid, it appears that the judgment aforesaid in form aforesaid given, was given for the said Board of Commissioners of the County of Miami, against the said Charles Moran, Theodore Moran, and Daniel E. Moran; whereas, by the law of the land, the said judgment should have been given for the said Charles Moran, Theodore Moran, and Daniel E. Moran, against the said Board of Commissioners of the County of Miami.

And there is also error in this, that the *third* plea and the matters therein contained are not sufficient to bar the action of the plaintiffs.

And there is also error in this, that the *fourth* plea and the matters therein contained are not sufficient to bar the action of the plaintiffs.

And there is also error in this, that the *fifth* plea and the matters therein contained are not sufficient to bar the action of the plaintiffs.

And there is also error in this, that the *sixth* plea and the matters therein contained are not sufficient to bar the action of the said plaintiffs.

And there is also error in this, that the *surrejoinder* to the rejoinder to the replication to the *third* and *fourth* pleas is sufficient to maintain the action.

And there is also error in this, that the *replication* to the *sixth* plea is sufficient to maintain the action.

And the said Charles Moran, Theodore Moran, and Daniel E. Moran pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they may have lost by occasion of the said judgment, &c.

DAVID McDONALD,
Att'y for Pl'ffs in Error.

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IN THE SUPREME COURT OF THE U. S.

CHARLES MORAN, *et al.*,

vs.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF MIAMI.

DEFENDANTS' BRIEF.

TOWERS, PRINT.

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IN THE SUPREME COURT OF THE U. S.

CHARLES MORAN, *et al.*,

vs.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF MIAMI.

ABSTRACT.

This was an action of assumpsit, brought by the plaintiffs in error to recover the amount due on thirty interest warrants, of one hundred dollars each, attached to certain bonds of $1,000 each, purporting to have been issued by the Board of Commissioners of the county of Miami, Indiana, to the President and Directors of the Peru and Indianopolis Railroad Company.

These bonds were issued on the 21st day of August, 1851, and were payable ten years from the 1st day of September of that year, at the office of the Treasurer of said county, in the town of Peru, bearing interest at the rate of ten per cent. per annum, payable annually at the same place. To these bonds were attached interest warrants, for the annual interest thereon. The warrants sued on were for the interest for the years 1857 and 1858. The interest for all previous years had been paid by the railroad company, and it was only when said company failed to pay the interest that the plaintiffs sought to hold the county of Miami liable.

These bonds state upon their face that they were issued under the authority of an act of the General Assembly of the State of Indiana, entitled, "An act to authorize the Commissioners of Hamilton, Miami and Tipton counties to borrow money," approved January 5th, 1849, and the resolutions of the Board of Commissioners of Miami county, printed record, page 4.

The above recited acts reads as follows:

"SEC. 1. *Be it enacted by the General Assembly of the State of Indiana*, That the Board of Commissioners of the counties of Hamilton, Tipton and Miami, be, and each of the said Boards of Commissioners are, hereby authorized to borrow money in any amount not exceeding fifty thousand dollars, from time to time, at any rate of interest not exceeding ten per centum per annum.

"SEC. 2. That all persons loaning money to said Boards, or either of them, are hereby authorized to receive any rate of interest upon such loans as may be agreed upon, not exceeding ten per centum.

"SEC. 3. All acts and parts of acts, so far as the same contravene the provisions of this act, are hereby repealed. This act shall be in force from and after its passage."—(Local Laws of Indiana of 1849, p. 164.)

The following are the resolutions of the Board, to wit:

WEDNESDAY, *August* 20, 1861.

Ordered, That this Board do hereby accept the propositions contained in the contract, obligation and order of the President and Directors of the Peru and Indianapolis Railroad Company, submitted to this Board on yesterday by Messrs. Holman and Murray, and herein before entered of record, and that this Board do hereby order the sum of twenty thousand dollars to be subscribed to the capital stock of the Peru and Indianapolis Railroad Company, on the conditions, covenants and agreements expressed in the order and contract of said railroad company.

And it is further ordered, That twenty county bonds, of one thousand dollars each, of the form issued by this Board at their session on the 10th day of June, A. D. 1851, and entered on the 89th page of this record, be issued in compliance with the aforesaid order of said company.—Record, p. 11.

The order and contract referred to in the above orders of the Board, read as follows, to wit:

KNOW ALL MEN, That I, John Burk, President of the Peru and Indianapolis Railroad Company, do hereby, and by the authority vested in me by an order of the President and Directors of the aforesaid company, passed at their July session, 1851, bind and obligate the company aforesaid to the county of Miami, for the performance of all the stipulations, to the letter, on the part of said company, contemplated or indicated by an order of the Board of Directors, providing for an increased subscription to the stock of said company, by the Board of Commissioners of Hamilton, Howard and Miami, passed on the 31st day of July, being the third day of the session of said Board of Directors, which order is as follows, to wit:

"'*Ordered*, That a committee of four, consisting of W. J. Holman, C. D. Murray, John Burk and John A. Stephenson, be and they are hereby appointed to apply to the County Auditor of the counties of Hamilton, Howard, and Miami, for a call of a special session of the Board of Commissioners of their respective counties, as soon as practicable after the adjournment of this Board. At the meeting of the respective Boards upon the call of the Auditor as aforesaid, said committee are further required to apply to said Board for an additional subscription to the stock of the Peru & Indianapolis Railroad Company, in the following amounts, to wit: The counties of Hamilton and Miami, respectively, twenty thousand dollars; the county of Howard ten thousand dollars. Said committee will propose to the several Boards that such subscription will be taken and received upon the following terms: that for the amount taken they at once issue bonds bearing ten per cent. interest per annum, redeemable at the expiration of ten years, with coupons attached, subject to be called in at the expiration of eight years, at the option of the Commissioners. That, upon the subscription of the stock of the company, and the issue of the bonds as above indicated, the committee aforesaid shall issue stock of the company, credited in full to such county, to the amount of such bonds. The President shall also execute an obligation, binding the company to pay the interest annually upon such bonds, as such interest shall become due, until the principal of such

bonds may become payable, and that, when the principal of such bonds shall become payable, that the company pay such principal also; and that, when such principal and interest shall have been paid by said railroad company, the Board of Commissioners of the counties aforesaid shall deliver to the authorities of the railroad company, in exchange for lifted and canceled bonds, the stock certificates issued at the time of the issue of such county bonds. The obligations above referred to shall provide further, that, if the counties aforesaid, or either of them, shall at any time before the redemption of said county bonds, elect to surrender to said company such obligation, and assume the payment of the interest that shall accrue after such election, and the principal, when the same shall become due and payable on such bonds, the stock issued as aforesaid shall become absolute in favor of such county or counties, they being entitled to all future dividends on such stock, but, until such election and assumption of payment of the interest and principal of the bonds aforesaid, on the part of the aforesaid counties, or either of them, that the stock issued in favor of such counties be held and kept as a security merely for the performance of the stipulation on the part of the railroad company, not entitling such counties to dividends, but allowing them a voice in elections for directors, from the date of such stock. The obligations to be executed binding this company to the counties aforesaid, shall further stipulate that, unless all the counties herein mentioned shall subscribe the amount expressed for each respectively, the subscription on the part of the counties subscribing shall be invalidated by such failure, on the part of any one or more of the counties, to take the amount as above expressed. It is further ordered that the Board of Directors will pay all necessary expenses incurred by the counties aforesaid in convening such Board of Commissioners and issuing such bonds.

To the performance of which, on their part, the
[SEAL.] President and Directors are hereby irrevocably pledged.

JOHN BURK,
President P. & I. R. R. Co."

"RAILROAD OFFICE, Noblesville, Aug. 13, 1851."

Record, pages 9, 10, 11.

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These resolutions of the Board of Commissioners were passed at a special or called session, convened by the Auditor on the 19th day of August, 1851, to "transact business of importance to the interest of said county, connected with the county subscription of stock in the Peru & Indianapolis Railroad Company."—Record, p. 12, lines 14 to 16.

The Statute which authorized a called session of the Board reads as follows:

"SEC. 1. *Be it enacted by the General Assembly of the State of Indiana*, That the several county Auditors in this State may call special sessions of the Boards of County Commissioners in their respective counties, whenever they may deem it for the interest of their respective counties to do so, by giving notice in writing, specifying the purpose for which they are called together to each of said Commissioners, which notice the Sheriff is hereby required to serve.

"SEC. 2. Upon receiving such notice, it shall be the duty of said Commissioners to meet at the time appointed therein, and transact the business for which such special session was called."—(Acts of 1845, p. 54.)

The defendant, in her third, fourth and sixth pleas, avers that these bonds were issued by the persons composing the Board of Commissioners of said county in vacation, and without authority; that they were issued and delivered to the railroad company for the purpose of loaning the credit of the county to said company, to enable it to borrow money, and without any consideration. These pleas were adjudged by the Court below to be good defences to the action, and the replications to them to be bad; and therefore the defendant had judgment on demurrer. The pleadings are sufficiently stated by Judge Huntington, in the following opinion which he delivered in the decision of this case below, to present all the questions which we shall submit for the consideration of this Court, and therefore we will not here repeat them. The following is the substance of the opinion of Judge Huntington:

OPINION.

"This is a suit to recover the amount of certain interest warrants or coupons, due on certain bonds issued by Miami county, payable to the Peru & Indianapolis R. R. Co., or bearer. These bonds on their face appear to have been issued for a loan of money to said county, in virtue of an act of the Legislature of 1849, authorizing certain counties therein named (including the county of Miami,) to borrow money for railroad purposes, and in virtue also of the resolutions of said Board.

"The contract is thus declared on:

"The defense set up is that the bonds were issued to this railroad company by way of accommodation paper, and in order to lend the credit of the county to this railroad company, and under a contract with this company, that the company was to pay the interest and principal as the same fell due, and not on any *bona fide* subscription of stock in the company, and that this arrangement between the county and the railroad company was made a matter of record, and that the plaintiffs had notice thereof. This is the substance of the defense set up in the third and fourth pleas.

"To these pleas the plaintiffs have replied that the orders directing the issue of these bonds directed also a subscription of $20,000 to the capital stock of the railroad company, and that the Auditor was directed to retain the bonds in his hands until stock to that amount should be placed in his possession, when he should receive the certificates of stock and deliver the bonds to the railroad company; and that it was so done; that the plaintiffs purchased the bonds in good faith, giving value, &c., under the belief that they were issued upon the consideration expressed on their face, and that the county has ever since held and voted the stock of the railroad company.

"To this replication there is a demurrer.

"These pleas (third and fourth) amount to pleas of a want of consideration; the replication does not deny the facts set up in these pleas, nor does it confess and avoid them; but it

alleges that the bonds were purchased *bona fide* for a valuable consideration, and without notice. This raises the two important questions:

"1st. Can the defendant set up the want of consideration against the plaintiffs, who are assignees, and claim to be purchasers without notice? and

"2d. Are the plaintiffs chargeable with notice of all that the record of the County Board contains in reference to the issue of these bonds?

"These bonds and the interest warrants are made payable on their face at the Treasurer's office of Miami county, and although transferable by delivery, are specially assigned by the railroad company, the payee named therein, to the plaintiffs, (by which assignment the railroad company agrees to pay the interest as it falls due in New York, instead of Miami county.)

"The Revised Statutes of 1843, in force when these bonds were issued, Sec. 6, p. 576, makes certain promissory notes, bonds, bills, &c., assignable and negotiable by endorsement thereon, so as to vest the interest in the contract in the assignee, &c. Sec. 8 permits the obligor to set up any defense to the obligation against the assignee or endorsee that he could against the original obligee, except, as in the 11th section provided, as to bills of exchange and notes put on the same footing.

"That these bonds are not within the exceptions mentioned in the 11th section of the statute, is too clear for argument. They are neither bills of exchange nor are they notes payable at any chartered bank.

"But it is insisted that they are of the character of negotiable paper, subject only to such defenses in the hands of *bona fide* holders as may be made to paper negotiable by the law merchant. It is true that the Courts have given this class of securities the character of negotiable paper, and when parties have received it in good faith, without notice, it has been protected. But it is difficult, I think, to extricate the bonds in controversy from the operation of the positive and clear provisions of the statute referred to. No judicial construction can affect the rights of parties under contracts of this nature, where the rights are defined by positive stat-

ute. In the cases in which this kind of paper has been held to be of negotiable character, the bonds have been issued in virtue of a special statute. In this case there is no law authorizing the issue of these bonds, and, unless the power to issue and put in circulation these bonds can be fairly implied from some power actually granted to the county of Miami, they must be held to be void. This was a domestic contract, and governed by Indiana laws. But, independent of the statute, the plaintiffs in this case are chargeable with notice of the character of the paper, and the terms on which it was issued by the county of Miami; for the bonds on their face refer in terms to the authority by which they were issued. A part of the authority is the resolutions of said Board. These resolutions constitute a part of the record, and show that the railroad company made a proposition that the county should take $20,000 of stock in said company, and hold it as security for the payment of $20,000 of bonds issued by the county; the bonds and interest to be paid by the railroad company. All these things appear in the record, and precede the resolution of the Board under which the bonds were issued.

"This record repels the idea that these bonds were issued for a loan of money, and shows most clearly that the bonds were issued as an accommodation to the railroad, and not, as is set up in the replication, upon a *bona fide* subscription of stock.

"Nothing can be clearer than that the county of Miami had no power in any capacity to issue these bonds. Under the late decision of Judge Grier, at Pittsburg, it is questionable, if the bonds had been issued on a *bona fide* loan of money, whether they could have been sustained. Oebrick & Co., *vs.* The City of Pittsburg, 7 American Law Register, p. 725, (729–30.)

"In the Knox county cases, so frequently referred to, there was no question of consideration—no question of power to issue bonds. Their issue was authorized by positive law, in payment of a subscription of stock, also authorized by law. The only question was whether certain preliminary steps had been taken, such as due notice.

"Although the Supreme Court in these cases evinced a dis-

position to hold such securities valid in the hands of innocent holders, notwithstanding antecedent irregularities, that Court never intended to disturb the well-settled principle, that corporations can do such things only as authorized by their charter, or fairly implied from powers expressly granted.

"The Board of Commissioners had no more power to lend the credit of their county to the Peru & Indianapolis Railroad Company, than they had to engage in banking: nor does the circumstance that they received stock in the railroad company, to the amount of the bonds issued, make any difference. Any other view of the case would give the County Board the right to involve the county to any extent. The morality of setting up this defense is not for this Court to consider. But the plaintiffs can not complain, for the very paper they hold notified them of the true character of the transaction.

"There are other minor matters urged in defense of this action, such as that the orders were made at a called session of the County Board, of which the notice was insufficient. I choose, however, to place it upon broader and more important grounds.

"The replication to the third and fourth pleas is bad.

"There is a demurrer to the replication on the sixth plea. This plea is like the third and fourth, with the additional allegation that the railroad company had no power to issue stock to the county when no *bona fide* subscription had been made, and no power to hypothecate stock to secure the county. The demurrer raises the same questions already decided.

"The judgment upon these several issues will be in conformity to the opinion above expressed.

BRIEF AND ARGUMENT.

In presenting the case to this court, the appellee proposes to pursue very much the same line of argument addressed to the Circuit Court, only abreviated.

We accordingly maintain the following propositions:

1. *The Board of Commissioners of Miami County had no power to issue the bonds and coupons in suit at the* TIME *they were issued.*

2. *Said Board had no power to issue said bonds and coupons in the* MANNER *and* FOR THE PURPOSE *for which they were issued.*

3. *Said bonds and coupons are purely domestic paper, made and payable in Indiana and governed by her statute law; and not subject to the law merchant, and hence that want of consideration is a good defense—the defendant in this connection examining the positions assumed and authorities cited by the plaintiffs.*

4. *That the plaintiffs are chargeable with notice of all that the record of the Board of Commissioners contains, with reference to these bonds, &c., of the power of the Board to issue them at the* TIME *and* FOR THE PURPOSE *they were issued.*

FIRST. *The Board of Commissioners of Miami County had no power to issue the bonds and coupons in suit at the* TIME *they were issued.*

The bonds were issued August 21, 1851. The sessions of the Boards of Commissioners have been prescribed by public statute ever since the organization of the State. The courts will, therefore, notice these statutes judicially; so that they need only be briefly indicated now. R. S., 1843, p. 181. Acts of 1844, p. 95. These acts which regulated the sessions of the Board of Miami County, will be further referred to hereafter.

It may be premised that, prior to the statute of 1845, hereafter set out, there was no statutory authority to hold sessions of the Board in vacation. In that year an enabling act on that subject was passed. To more fully understand the extent of the enabling act, let us inquire

1. What were the powers of these Boards in vacation prior to the statute of 1845?

2. What change did that statute make in the former law?

Before the statute of 1845, several cases had come before the Supreme Court of Indiana, involving questions of the powers of these Boards in vacation—particularly their powers to contract, even when the contract related to the proper and necessary business of the county. Two decisions will illustrate the question of power—citing the last, in point of date, first.

In Campbell *vs.* Breckinridge 8, Blackf. 471, the Supreme Court state the facts, and announce the law arising therein, as follows:

'The Board of Allen County made a contract with Mr. Coquillard for plastering the Court House, and executed written agreements accordingly. This was done in vacation at a special Term of the Board, in January, 1832, and not at the regular session. One of the points made was the validity of this contract.' On this branch of the case, the court say: 'The only remaining question is, was the contract between the Board of Allen County and Coquillard binding upon the Board or upon the County? This question may be briefly disposed of. In Archer *vs.* The Board of Allen County 3, Blackf. 501, we held that, in a suit on a contract for work and labor, *no act of the members of the Board could render them liable, in their corporate capacity, unless such act was done by them at a regular meeting of the Board at the time fixed by law. Their powers are created and defined by statute. They are, in fact, agents with strictly limited powers: and for any act done by them, not within the scope of such powers, the county, as a body politic or their successors in office, are not responsible*, 8 Blackf., *Sup.*'

In brief, because the contract was not made at the regular session, as fixed by law, it was therefore void.

In the case of Archer *vs.* The Board, &c., cited above, the declaration counted on a contract for brick; but failed to allege that the contract was made at a regular session of the Board. A demurrer to the declaration was sustained because

of this defect. The plaintiff should have alleged that the contract for brick was made at a regular session of the Board. In a word, the Supreme Court of Indiana hold that it must appear affirmatively that the authority conferred by statute had been strictly complied with, in order to bind the county.

These two cases settle the law as to the power of the Board to make any binding contract prior to 1845. They decide, conclusively, that the Boards, &c., had no such power; and that, if they assumed to contract at special sessions, such contract was null and void.

There are numerous other cases, in the Indiana reports, to the same effect, a synopsis of one or two we give to show the continued and uniform course of decision on the powers of such Boards.

Thus, the few powers which the Board may exercise must be exercised in strict accordance with the statute conferring them. State *vs.* Cooper 5, Blackf. 325.

So at a later period, Boards of County Commissioners are courts of limited and special jurisdiction; and their records must show that the requisitions of the statute, under which they act, were strictly complied with. Rhode *vs.* David 2, Ind. 53.

So still later it was held that the Boards of Commissioners are courts of record; whatever they do is presumed to be entered of record; and when there is no record, there has been no valid action. The Board, &c., *vs.* Cutler 7, Ind. 6.

These authorities are conclusive that under the laws of Indiana, prior to 1845, the Board of Commissioners could only do a corporate act, such as making a contract at their regular sessions as fixed by law; that all their acts must appear of record; and the acts there recorded must be in strict conformity with the time, terms, and conditions, prescribed by statute.

And in this, the Indiana courts do but adhere to the well established English rule in regard to inferior and special jurisdictions. A leading English case on this point is Davison *vs.* Gill, 1, East. 64, decided by Lord Kenyen. So also in New York, Bigelow *vs.* Stearns, 10 J. R., 39, to the same effect.

We therefore conclude, that the Board of Commissioners, of Miami county, could not, by any action of theirs in vacation, prior to the statute of 1845, bind the county. All such action was wholly void.

2. We proceed then to the the second branch of enquiry under the first head, viz: What change did the statute of 1845 make in this behalf?

The legislature of that year authorized special sessions of the Board to be called; but we hope the court will note particularly *the limited and guarded terms in which the power is granted.* Thus—

"Sec. 1. Be it enacted, &c., that the several county auditors, in this State, may call special sessions of the Boards of Commissioners, in their respective counties, whenever they may deem it for the interest of their respective counties to do so, by giving notice in writing, SPECIFYING THE PURPOSE for which they are called together.

"Sec. 2. Upon receiving such notice, it shall be the duty of the Commissioners to meet at the *time appointed therein*, AND TRANSACT THE BUSINESS FOR WHICH SUCH SPECIAL SESSION WAS CALLED."

There is the whole authority for special sessions, and the transaction of business thereat conferred by the statute of 1845.

What change does this statute introduce? Simply to enable them to transact the business, if it be within the scope of their powers, for which the auditor called them together. If it was business beyond their agency, it is obvious the call of the auditor could not confer jurisdiction. It must be business which they would be authorized by statute to do at a regular session.

It is equally obvious that outside of the business specified in the call, the Board is now as powerless at special sessions as they were before. They have no authority outside of the specifications of the call to do any corporate act whatever. The auditor's call is like the specifications in a trial by court martial; is like a bill of particulars in a case at law. The call must specify, viz: Point out particularly the very busi-

ness which the Auditor deems it for the interest of the county to be done before the regular session.

If the call of the auditor is in vague general terms, and specifies no particular business, then, at such called session, the Board can do nothing. A *general* notification to transact business, &c., will not, under the statute of 1845, enable them to transact any *particular* business. The special business must be clearly and expressly set out, otherwise the call of the auditor is itself a nullity. In such case the Board stand precisely where this enabling statute found them:—wholly without authority to act as a corporation only at their regular sessions as fixed by law. 10, Ind. 358.

The law regulating the sessions of the Boards, &c., at the time the bonds were issued, was a public statute, to be judicially noticed, and fixed the regular sessions of the Miami County Board on the first Mondays of March, June, September, and December, each year, and they might sit *five days* if the business required it.—R. S., 1843, p. 181; Acts 1844, p. 95. So that by no possibility even could the Board of Miami County be in regular session on the 21st of August, 1851, when these bonds and coupons were issued. The bonds must therefore have been issued at a special session. And the law regulating the sessions of the Boards, both the regular sessions and the called sessions, being public acts, everybody, the plaintiffs included, was bound to know.—Platt *vs.* Scott, 6 Blackf., 389.

It remains to inquire whether the terms of the Auditor's call were such and so specific as to authorize the Commissioners to transact any business; for the very basis of their power to act in vacation must be found specified in the Auditor's call. The substance of that call is set out by the plaintiffs themselves in their replication to the second plea.—Record p. 12. If the call is not fully set out, that is the fault of the plaintiffs, and the presumption of law is against the pleader. The Auditor's call is thus set out in this replication, viz: to meet, &c., to *transact business of importance to the interests of said county, connected with the county subscription of stock in the Peru, &c., R. R. Co., &c.*

This is the specification of the call as set out by the plaintiffs themselves.

Is this sufficiently specific to authorize the Commissioners, under the statute of 1845, to meet in special session and there transact the business of issuing twenty thousand dollars of county bonds? We respectfully submit that it is not.

1. In the first place, if the transaction is, as alleged by the plaintiffs, a borrowing of money and issue of bonds, then it is too clear for argument that the plain reading of the call does not contemplate any such purpose. In that light the whole proceedings at the special session were unauthorized and void, and the bonds and coupons void. In Rosenthal *vs.* The Mad. & Ind. Plank Road Company, 10 Ind., 358, it is held "that the Board of County Commissioners being an inferior Court of special and limited and statutory jurisdiction, it must appear upon the face of its proceedings that its action was in conformity with the requirements of the statutes governing the same. Thus an act of 1845, p. 54, empowered the County Auditor to call special sessions of the Board, by giving notice in writing to each of the Commissioners, specifying the purpose for which they are called together, and in the event of such meeting they should transact the business for which such special session was called: and held, further, in a suit where an order by two Commissioners was relied upon, the third not being present, that it should appear that such notice was given, and that such order was upon the subject matter of the notice, *for at a special session the Board would have no jurisdiction over any business not specified in the notice calling it.*"

We further submit that the call does not contemplate a further subscription of stock to the railroad. For the record shows, and it is not controverted, that prior to the call of the Auditor, viz: on the 27th of October, 1849, the county of Miami had subscribed twenty thousand dollars of stock to the Peru Railroad Company.—See rejoinder to Rep'n to 2 Plea. Record p. 16. The call of the Auditor, if it means anything, seems worded with reference to *the* subscription already made in October, 1849, and not to *a new* subscription to be made at the called session in August 1851.

In point of fact, no *bona fide* subscription of stock was made

at the called session in 1851. The contract between the R. R. Co., and the County Board set out in the Record, p. 10, does not contemplate an actual subscription of stock. The whole contract must be construed together to ascertain its true meaning. The real transaction is this: The County Board is to issue accommodation paper, in the form of bonds amounting to twenty thousand dollars. The R. R. Co. assumed the payment of these bonds, both principal and interest. The R. R. stock was issued, not in payment of the bonds, but as a collateral security merely, not even entitling the county to dividends on the stock. These are some of the express stipulations of the contract, to which we beg the attention of the court.—See Record, pp. 9, 10.

Surely, nothing of all this long and complicated contract, is indicated, or more properly speaking, *specified*, in the call of the Auditor. The Board might just as well, on collateral security given, have issued the paper of the county to accommodate the pork buyers and grain dealers of the Wabash valley.

If any stress be laid on the phrase, to "transact business of importance to the interests of the county," we submit that under the adjudications of our own and the English courts, relative to inferior jurisdictions, and especially the decisions of the Supreme Court of Indiana, already cited in regard to these County Boards—this phraseology of the call is too vague to authorize the Board at such special session to do anything.

We therefore submit that the special session of the Board in August, 1851, was wholly unauthorized; and the bonds and coupons issued at that *time*, void.

SECOND. *Said Board had no power to issue said bonds and coupons in the manner, and for the purposes for which they were issued.*

Suppose, for the sake of the argument, that the auditor's call had specified this whole transaction just as it was;—viz: that the county should issue accomodation paper in the form of County bonds, to and for the use of the Railroad Company; that the Railroad Co. should agree to protect the bonds at maturity, both principal and interest, and should further hy-

pothecate an equal amount of Railroad stock as security, had the Board power to make any such contract at such special session? Clearly not. In the absence of proper legislative authority, the Board had no power to issue bonds as accommodation paper even at a regular session. The call of the Auditor could not enlarge their powers—could not enable them to do that at a special session which they had no power to do at a regular session. Unless therefore, the party claiming these bonds to be valid can show some legislative authority for issuing accommodation paper the whole thing is *ultra vires* and void.

But the plaintiffs count upon the law of January, 1849, Record p. 1. That act is in these words, viz:

"Section 1. *Be it enacted, &c.*, That the Boards of Commissioners of the counties of Hamilton, Tipton, and Miami be, and each of said Boards of Commissioners are hereby authorized to borrow money in any amount not exceeding fifty thousand dollars from time to time, at any rate of interest not exceeding ten per centum per annum."

It is to be observed of this law:

1. That it does not authorise the Miami County Board to borrow money at any other than a regular session of such Board.
2. Or at a special session of the Board specially called, and the call specifically sitting out that purpose.
3. Nor unless the money was borrowed for the proper and necessary business of the county.
4. Nor does the law quoted authorize the County Board to issue the bonds of the County as accommodation paper to Railroad Companies, or grain or cattle dealers.

The only purpose for which money could be borrowed, is that expressed in the third proposition above set out, viz: the necessary business of the County, such as building a court house or jail or other necessary buildings for County convenience. And the purpose for which the money is to be borrowed should be specified in the Auditor's call, if done at a special session, 10 Ind. 358 *supra*. So that the act of January,

1849, upon which the plaintiffs count in their declaration does not avail them—does not in the least relieve them from the embarrasing facts disclosed in the pleadings and contract set out therein.

The 28th section of the Peru Railroad charter was relied on in argument in the Court below; but does not assume much prominence in the printed brief in this court. But as it may again be urged in oral argument, we set out the section. Laws of 1846, page 216.

"It shall be lawful for the County Commissioners of each county through which the road shall pass, for and on behalf of such county, to authorize by an order as much stock to be taken as they may think proper."

The terminii of the Peru &c. Railroad are the towns of Peru and Indianapolis, in the centre of Miami and Marion counties respectively. The Railroad therefore passes *into* these counties—not *through* them. It would be trifling with the plain use of language to say that *into* and *through* were synonymous. Many instances of the distinction between these words will occur to any one, and need not be suggested. The line of road itself furnishes the happiest illustration. The Railroad passes North from the centre of Marion County *through* the counties of Hamilton, Tipton and Howard *into* the centre of Miami County. There is the very distinction for which we contend, illustrated by the subject matter itself. Had the Legislature intended any thing different it would have been easy to say so, by the words *through* or *into* which the road shall pass. That it did not say so is the highest evidence that it did not mean so.

It may be remarked generally, of this and all other grants, both to the R. R. Company and the Board of Commissioners, that the rule of strict construction is well settled; grants to corporations are always strictly construed. 27 Penn. st. R., 339. Id., 380. 4 E & B, 799. 4 Bingham, 452. 4 Peters, 514. 19 Penn. st. R., 211. 8 Howard, 581. 3 Peters, 398. 12 Wheaton, 40. 4 Denio, 520. 11 Peters, 545.

This strictness is well illustrated in the Commonwealth *vs.* The Erie, &c., R. R. Company, 27 Penn. st. R., *supra.* The charter of the R. R. Company was granted in 1842, and authorized the R. R. Company to construct their road from the

borough of Erie, to some point on the east line of North-east township. In 1848, the borough of Erie was made a city with enlarged boundaries. In 1852, the R. R. was constructed to the exterior boundary of Erie, as enlarged, but 60 rods south of the line of the borough, as it existed in 1842. Black, C. J. says: "This case requires us to give construction to the charter of a private corporation. The frequency of such cases excites some surprise when we reflect that an act of incorporation is, and always must be, interpreted by a rule so plain, that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do it may do; beyond that, all its acts are illegal. And the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakeable manner are withheld. If a corporation claims certain privileges, show us the words of the legislature conferring them. A doubtful charter does not exist, for whatever is doubtful is decisive against the corporation."

Elsewhere in the same opinion the court say: "The law commanded the R. R. Company to bring their road to the borough of Erie, as it existed in 1842. The directors had no right to substitute their own will for the plain requirement of of the law."

Numerous other authorities lay down the same rule, perhaps, not so happily and pointedly expressed.

The same rule prevails in Indiana, both as to municipal and private corporations. Smith *vs.* City of Madison, 7 Ind., 86. City of Lafayette *vs.* Cox, 5 Ind., 38. Kyle *vs.* Malin, 8 Ind., 35. Smead *vs.* The Indianapolis R. R. Company, XI Ind. R., 109.

So, also in this court, the word *between* was held to be of doubtful import, and that the ambiguity must fall against the R. R. charter in favor of the public. Richmond R. R. Company *vs.* Louisa R. R. Company, 13 Howard, 81. So also charters are to be construed favorably to the public. The Banks &c., *vs.* Shelly, 1 Black's R., 446.

The word *through* would also seem to have received construction in a recent case in this court. A statute of Pennsylvania, enacted that the counties, *through parts*, of which said railroads may pass, are authorized to subscribe stock, &c.,

to make payments as agreed upon, &c., to issue county bonds, &c. Lawrence county issued bonds, &c., and upon suit thereon was held liable. Woods *vs.* Lawrence Co., 1 Black, 446.

But mark the different wording. The Indiana charter is *through* which the Road may pass. The Penn. statute, *through part* of which, &c. The latter expression is clearly equivalent to the words, *into* which the road may pass.

So that as a privilege of the Peru R. R. Co., the words, the counties through which the railroad passes, must receive a strict construction, both as to the R. R. Co., and the County Board, and favorable to the public. If the Railroad did not pass through the county of Miami, as it passed through Howard and Tipton counties, the Board of Miami county had no authority to subscribe stock. If subscribed, the subscription was void.

It is therefore perfectly clear that the County Board of Miami had no power to issue bonds in the *manner* and for *the purposes* they were issued. The Board had no power to borrow money for such purposes under the one act; nor to subscribe stock under the other. In point of fact, there was no borrowing of money under the one statute, nor a subscription of stock under the other. Even had the Board been empowered by statute to subscribe stock under one act, and borrow money under the other, they had no power to issue accommodation paper to the Railroad Company, and take stock of the Railroad Company in security. If the Board were authorized to do one act, and they have done another and different act, such other act is void.—Sedgwick on Statutes, 347 *et infra.*

SEC. 4. *Said bonds and coupons are purely domestic paper, made and payable in Indiana, and governed by her statute law; not subject to the law merchant, and hence want of consideration is a good defense; the defendant in this connection examining the authorities cited by the plaintiffs.*

At the time these bonds and coupons were issued, the Revised Statutes of the State of Indiana of 1843, were in force. As these bonds and coupons were purely domestic paper, made in Indiana, payable there, by and to parties *quasi* citizens of

Indiana, we confidently submit and claim that the contract is governed by the laws of Indiana. We further submit that, in the construction of State laws, the Federal Courts will, whether as a matter of courtesy or right is immaterial, be governed by the construction given to such laws by the State Courts. In other words, this Court will apply the Statutes of Indiana as expounded by the State Court of last resort. In Oebrick & Co. *vs.* the City of Pittsburg, 7 Am. Law Reg. 720, Mr. Justice Grier says in substance, that the Supreme Court of a State is the authoritative expounder of her constitution and laws. To their decision it is the duty of the Federal Courts to submit without questioning its propriety. No artificial notions of policy or commercial convenience can be permitted to intervene. Indiana is entitled to her own laws and usages, without control, modification or repeal by any Court or power, unless they are shown to conflict with the Constitution or laws of the United States. This is not pretended. Hence, the question is not what the Indiana laws should be, but what are they?

The case is also happily relieved of another source of occasional embarrassment. The contract is not made in one State, to be performed in another. No laws or usages of other States on the subject of commercial contracts can have any application. It is a purely domestic contract. On such a contract, Indiana law, where it speaks on the subject matter, must exclusively govern. In other words our proposition is, that these bonds and coupons are domestic contracts, governd by the Statutes of the State of Indiana, and, under these statutes, such want of consideration can be pleaded against a *bona fide* purchaser for a valuable consideration.

If the learned counsel on the other side had seen proper to present the question in this, its true and simple character, it would have abridged the labors of both Court and counsel very materially.

The Indiana law, which governs the case, we propose to present in the very language of the Statute itself, thus:

"SEC. 6. All promissory notes, bills, BONDS or other instruments in writing, made and signed by any person or CORPORATION, whereby such person or CORPORATION promises to pay

any sum of money, or acknowledges any sum of money to be due to any other person or persons, or CORPORATION, or for the delivering of any specific article, or to convey any property, or to perform any condition or conditions therein mentioned, shall be, and the same are hereby made assignable and negotiable by endorsement thereon, so as absolutely to transfer and vest the property thereof in each and every endorsee successively."—R. S. 1843, p. 576. Sec. 6.

"SEC. 8. The maker, drawer or obligor, of any such note, bill, BOND, or instrument, except as hereinafter provided, may set up and show any legal or equitable defence to such action which he had thereto as against the payee, drawee, or obligee, before notice of the assignment thereof by such payee, drawee, or obligee, and which he might have set up and shown had an action been brought on such note, bill, bond, or instrument, in the name and for the use of the original payee, drawee, or obligee."—R. S. 1843, p. 577.

"SEC. 11. Nothing contained in the preceding section shall alter or affect the law as it now is, as relates to bills of exchange, foreign or inland."—R. S. 1843, p. 578.

"SEC. 17. All notes in writing, negotiable and payable at any chartered bank in this State, in which such bank has any beneficial interest, &c., shall be taken as due and payable, &c., and shall have the same effect, and be negotiable in like manner as inland bills of exchange, according to the custom of merchants, &c."—R. S. 1843, p. 579.

"SEC. 214. In any action founded upon any speciality or other contract, conveyances of real estate and instruments negotiable by the law merchant excepted, the defendant, by special plea, may allege the want or failure of consideration, or any part thereof; and if any speciality or other contract, except as aforesaid, is alleged in any plea, replication or other pleadings, by any of the parties, the other party may in like manner allege the want or failure of the consideration, or any part thereof."—R. S. 1843, p. 710.

Such is the law of this State governing the bonds and coupons in question.

The sixth section, first quoted, defines what instruments shall

be assignable by endorsement, so as to vest the legal title in the assignee, and enable him to sue in his own name.

The eighth section, above quoted, provides that the maker, obligor, &c., shall have all legal and equitable defenses against every party to the paper, before notice of assignment, except as thereafter specified.

These exceptions are afterwards specified in the 11th, 17th, and 214th sections, above quoted, and relate—

1. To bills of exchange properly so-called.
2. Notes negotiable and payable at a chartered bank, in which the bank has an interest. These two classes of paper are left to the general principles of law which obtain under the law merchant, such as protest, notice, &c., &c., not necessary to be enumerated here.
3. Conveyances of real estate.

It would seem that the statute above quoted leaves no doubt of the character of the bonds and coupons in suit. They come within the very letter of the first clause of the statute quoted, making *bonds* by *corporations* to *corporations* assignable by endorsement thereon.

These bonds, we have seen, do not come within any of the excepted classes. There is no pretence even that they have any characteristic or principle in common with conveyances of real estate.

That they are not foreign or inland bills of exchange, is too clear for argument.

That they are not instruments placed by the 17th section above quoted, on the footing of bills of exchange, and thus subject to the law merchant, is settled conclusively by the terms of the statute and face of the papers, both bonds and coupons. With the bonds and coupons in one hand, and the Statute of Indiana in the other, it seems difficult to come to any other conclusion. They are neither negotiable nor payable at any chartered bank in Indiana. It is not pretended that any bank has any beneficial interest therein. And to make them subject to the law merchant, they must fill, not merely one or two of the statutory conditions, but all three of them. They must be payable at a chartered bank in In-

diana; they must be negotiable there; and such Indiana bank must have a beneficial interest therein.

We therefore infer that these bonds and coupons are not subject to the law merchant.

Indeed it seems necessary to apologise for arguing such a question to this Honorable Court. But that apology is easily found in the earnestness and perseverance with which learned council on the other side insist on these bonds and coupons being commercial paper. We have no higher law in this State. The Constitution and laws of Indiana are on all questions of local domestic polity, the highest authority known among us. If there is any process by which our laws can be emasculated or repealed by any power but the Legisture, it is time Indiana found out who has a right to nullify her laws and construe her domestic contracts by other legal standards than those she has herself enacted.

It really requires some patience to pursue the winding way of our learned opponents; and perhaps the shortest mode of dealing with the argument is to quietly analyze and expose it.

Under the statutory provisions, first quoted, the incidents attaching to the two classes of paper are worth notice. The one may be called paper assignable by statute, the other commercial paper. Paper of the first class differs very widely from paper governed by the law merchant. Paper assignable by statute, contemplates no protest; it is not governed by any of the incidents so familiarly known as belonging to commercial paper.

It requires, however, that the assignee should use due diligence in prosecuting the maker, otherwise the assignee looses his recourse over on the endorser. This principal has grown up under judicial decisions of our Supreme Court on the statute cited, until it is now as well settled and as familiar to the bar and Courts as the statute itself. What constitutes due diligence is not material to the question at bar; but may be traced in the following, among other decisions. Merriman, *vs.* Maple, 2 Blackf., 350. 1 Blackf., 181. 6 Blackf., 127. 7 Blackf., 349.

Again the payee (and assignor) of a note under the statute warrants that the paper is valid, and the maker is liable to pay; also, that the maker is solvent and able to pay. How-

ell *vs.* Wilson, 2 Blackf., 418. Herald *vs.* Scott, 2 Ind., 55. Sering *vs.* Findley, 7 Ind., 247.

Such is the course of decision gradually engrafted on the statute of assignments. In all this class of cases the provisions of the statute, allowing defenses, both legal and equitable, have been carried out to the fullest extent.

On the other branch of the statute in relation to commercial paper, or paper which by the statute is placed on a footing with bills of exchange, the Supreme Court of Indiana adheres to the well settled rules and usages of commercial law. These decisions mark the broad distinction between paper assignable by statute, and strictly commercial paper. Thus, in Glover *vs.* Jennings, 6 Blackf., 10. The action was on a promissory note, payable and negotiable at a chartered bank in Indiana, and endorsed before due. Pleas, want and failure of consideration, and fraud. Demurrer, sustained, to the pleas, and judgment for the plaintiff. The Supreme Court say—had the note not been payable at a chartered bank in this State, &c., most of these pleas would have been good, as between the maker and payee, and as between the maker and assignee. So if the note had been assigned after it became due. 7 T. R. 419. But the pleas are bad because notes like the one at bar, endorsed before due, are placed by the statute on a footing with inland bills of exchange, and are governed by the law merchant. These pleas could only be good against the endorsee, by showing that the endorsment was made without consideration; or with notice of the fraud; or after the note became due; see the several English authorities cited by the Court.

Subsequently in Hawkins *vs.* Shoup, 2 Ind., 342, the above decision in 6 Blackf., *sup.*, is referred to with approbation. The Court further says—had sections 8 and 9, of the statute of 1843 stood alone, they would have authorized these pleas (to commercial paper,) but the 11th section cuts off such defense to bills of exchange, foreign and inland.

This is sufficient to show that the Courts uphold and adhere to the distinction which the statute of Indiana makes as to paper like that at bar, and paper subject to the law merchant. To the one the Courts admit the fullest latitude of defense, both legal and equitable, even against an assignee. In the

case of bills of exchange, or paper which the statute makes subject to the law merchant, the Indiana Courts adhere to the well settled rules of commercial law, as settled in England. 6 Blackf. *sup.*

To be able to avail of the warrantee alluded to in paper assignable by statute, the assignee must prosecute the maker to insolvency, or show some legal excuse for failing to do so. Howell *vs.* Wilson, 2 Blackf., 418. Fosdick *vs.* Starbuck, 4 Blackf., 417. Henderson *vs.* Fox, 5 Ind., 489.

These and other incidents distinguish in our polity, non-commercial from commercial paper—distinguish paper assignable by statute, from paper governed by the law merchant.

In brief, all such paper in this State, must belong to one of the two classes. It is either governed by the law merchant, or it is not. There is no middle—no intermediate class with a variable line of defense. If this were strictly commercial paper, it is conceded that the defense is untenable on that point, viz: as to the want of consideration. If it is not commercial paper, then the want of consideration is well pleaded, and is a good defense to the action.

We next proceed briefly, to examine some of the positions assumed, and authorities cited by the plaintiffs.

Among the many singular positions assumed by the counsel in the Court below, was this—that though it might be true, that this paper was not, strictly speaking, governed by the law merchant, yet that the County Board was estopped by the face of the bond from setting up any defense. The recitals in the bond operated as an estoppel. And in support of this position, Sloan *vs.* the Richmond, T. & M., 6 Blackf., 175. Powers *vs.* Talbot, 11 Ind., 1. And Paul *vs.* Baugher, 8 Ind., 501, were cited. It is proposed to examine these cases presently.

It seems obvious enough, that if the plaintiffs view be a sound construction of the Indiana statute above cited, then every note, and particularly every bond, would, on its face estop the maker from setting up any defense. The statute, (214 section, *sup.*,) allowing want or failure of consideration to be pleaded, would be a mockery.

The learned counsel seems unfortunate in the authorities cited to sustain their position. The cases cited, are where the

assignee before purchasing the note, took the precaution to inquire of the maker whether he had any defense. On the faith of the assurance that he had not, the paper was purchased. The Courts say the maker is estopped and cannot afterwards set up a defense against such assignee.

Very true; that is the law. But the cases cited do not support the premises assumed. Counsel set out with an alleged estoppel by bond, and illustrate and support it by decisions, enforcing an estoppel in *pais*.

This is, to say the least, not very logical. It is not pretended that the plaintiffs, before the purchase of the bonds and coupons, had ever applied to the County Board to see if they had any defense, or ever received any assurance from the Board that they had not. Hence, in the absence of such matters *in pais*, the authorities cited do not fit the case at bar. Let us briefly examine some of them.

Powers *vs.* Talbot, 11 Ind., 1, was this: The jury found specially that the plaintiff purchased the note upon the promise of Powers, made during the negotiations for the purchase, that the note was valid and he would pay it. The Court held the defendant, Powers, estopped to set up the invalidity of the note as between him and the payee, citing Muchmore *vs.* Bates, 1 Blackf., 248; Sloan *vs.* The Richmond, T. & M. Co., 6 Black., 175; Williams *vs.* Rank, 1 Ind., 230; Paul *vs.* Baugher, 8 Ind., 501.

The case in 8 Ind. *sup.* was this: suit by the assignee against the maker. Before purchasing the notes, the plaintiffs called on the defendant and informed him they were about to purchase the notes, and asked him if he had any defense or set-off. He answered he had none whatever, and would set up none if they purchased the notes. This was held a good estoppel to the defendant's setting up a set-off, citing 6 Blackf., *sup.*

This last case, 6 Blackf., *sup.*, decides that though a note be obtained from the maker by fraud, yet, if the maker induced an innocent person to purchase it without disclosing the fraud, and on the assurance that it would be paid, the maker would be estopped to set up the fraud in defense. To the same effect is 14 Ind., 397; 16 Ind., 284.

On the doctrine of estoppel, the New York Court of Appeals, in a late elaborate and celebrated case, say:

"The question is, whether by the transfer the title of the assignee is good, when the title of the assignor was good for nothing. If extreme caution be exercised, the purchaser will inquire of the maker of its validity and his assent to its transfer. Having done so, an estoppel in *pais* will arise in favor of the assignee, not because he has paid his money, but because he purchased after procuring such consent and admission, and upon the faith thereof. When there is no estoppel in *pais* to rely upon, then the question arises whether the assignee of an obligation apparently sound on its face and from the apparent owner, acquires any better right to enforce it than his assignor had, depends upon the nature of the obligation itself. If the instrument is negotiable he may: if not negotiable, an equitable title is all (under the New York statute) that can be acquired. And this suggests the further observation that as between equities merely, the prior equity as a general rule prevails. The prior equity, as well as the law, is in favor of the party who made the instrument, if for any good and valid reason he ought not to be bound to pay it."—3 Kernan, 622.

Again, in the same case, the Court of Appeals, as though they had listened to the learned counsel opposite in the case at bar, further held:

"The notion of estoppel which has been advanced in the argument, deserves by itself very little consideration. Every corporate, as well as private obligation or instrument, undoubtedly contains an express or implied representation of facts upon the faith of which innocent parties may deal. If it be a promissary note, value received is a fact either expressed or implied. And although the fact may not be so, the maker is bound to pay the obligation in the hands of an innocent third party, not upon any theory of estoppel, but upon principles peculiar to that species of paper, (viz: under the New York statute.)

"When the instrument is not negotiable by the law merchant, the maker may be affected by an estoppel in *pais*, if

it be transferred upon his representation of its validity, and the dealer acts upon that representation. But to say that he is estopped by the instrument itself, simply because he made it and a third party has dealt with it, is only asserting in another form that fraud, mistake, duress, illegality, want of consideration, or want of authority when the act is one of pretended agency, is no defence. This would subvert the settled maxim, that the assignee or purchaser takes subject to all equities between the original parties. It would subvert also another maxim which belongs to the doctrine of estoppels itself, viz: that an admission or representation is no estoppel in favor of a stranger to whom it was not made, and whose conduct it was not expressly designed to influence."—3 J. C., 101; 3 Hill, 215; 6 Hill, 534.

And this, too, from a New York court, where almost every thing is governed by the law merchant. Much more in Indiana, where the face of the paper is no estoppel to any legal or equitable defence the defendant may have.

Counsel have a peculiar way of assuming the very thing to be proved. Thus, in the argument below it was assumed that the bonds being commercial securities in the hands of the plaintiffs, as *bona fide* holders, they were entitled to recover, notwithstanding the defendant might have a good defense as between the original parties to the transaction. A long list of authorities are cited and commented on as applicable to the case thus assumed.

We propose to examine first the assumptions and then the authorities cited.

The assumptions. It is assumed in the foregoing that these bonds are commercial securities. That is the very point in controversy. The plaintiffs affirm and we deny that they are commercial securities. That is the very jist of the suit at bar. It has been conclusively shown, we hope, from the statutes of Indiana, and the decisions of our Supreme Court, which alone must govern this case, that these bonds are not governed by the law merchant, but are of the class made assignable by statute, and subject to any legal or equitable defence the maker may have.

It is further assumed that the plaintiffs are *bona fide*

holders. What if they are? Does the statute of Indiana above cited say that the maker shall not have any defense against a *bona fide* holder? Nay, does not that very statute expressly provide that the maker shall have the same defenses against every *bona fide* holder which he had against the payee prior to notice of assignment?

Again, the assumed potency of the word *bearer* in the bond. It was in this connection that little word was made to play a seductive part. It was rather assumed than asserted that the plaintiffs stood in the light of holders or bearers of commercial paper not yet due when they received it. This assumption is too transparent to need much comment. Their own declaration shows that they do not claim as BEARERS of these bonds, but as ASSIGNEES by written assignment from the Peru and Inds. Railroad Company.—See Record, p. 3, line 7, *et infra.* And we must be permitted to remind the plaintiffs again that the paper they hold by assignment is not commercial paper—not subject to the law merchant. As such assignees, the law of Indiana has clothed them with rights and duties entirely different from those which belong to parties to commercial paper. These rights and duties have been already indicated and the authorities cited *supra.*

There are two at least very obvious illusions in the minds of the plaintiffs as to the word *bearer.* It is assumed that the word is a material one in the Statute of Indiana. In point of fact, the word *bearer* does not occur in the statute quoted. It has no place or materiality in our laws. The second illusion is, that the word bearer has the same significance in the case at bar which it has by usage in a bank note, or by statute in a New York commercial contract. Accordingly, all the cases cited to this point are bank note cases, or statutory cases which, like New York, makes all notes, bonds, &c., subject to the law merchant. It is true, in some of the cases cited there is a certain quantity of extra-judicial twaddle and judicial legislation, rather indicatory of what the law would be if the Court had the control of the legislature, than entitled to citation and respect as a solemn and well-considered judicial determination of what the law actually is. Such cases may go for what they are worth.

The first case cited, for instance, is Bullard *vs.* Bell, 1 Ma-

son, 243. The case is cited to support the force and construction given to *bearer* in the contract at bar. It was a suit against a stockholder of a bank on a bank bill payable to the fictitious personage *Wm. Pitt or bearer.* In such cases, say the Court, the holder never makes any title by or through any assignment. There is no assignment in the case. The holder claims merely as holder.

The Bank of Ky. *vs.* Wister, 2 Pet., 318, is a bank note case also, in which the Court merely say, that the uniform ruling had been that a bank note payable to bearer was payable to anybody, and not affected by the disabilities of the nominal payee as to the jurisdiction of the Federal Court.

These it will be seen were not only bank cases, but jurisdiction cases, arising on the supposed disabilities of the payee or bearer to sue in the Federal Court. But as the plaintiff in both took as bearer and not as assignee, the Court held that the question of jurisdiction under the judiciary act did not arise. What application these cases can have to that at bar, it is scarcely worth while to speculate.

The word *bearer* in an Indiana contract cannot have much weight, because as we have seen, the statute does not use the word at all. We are not enquiring what effect the word might have on contracts purely commercial, either at common law, or under a statute like that of New York for instance, where the word *bearer* seems to be material. Our statute does not say that notes payable to bearer shall be subject to the law merchant. That little word *bearer* can hardly mean what is claimed for it in argument, viz: to cut off a defense clearly given by statute. *Thus in Woodward vs. Mathews,* 15 *Ind.,* 339, *it is held that a note payable to bearer, but not in a bank in this State, though negotiable, is subject to whatever defense or set-off the maker of such note had before notice of transfer.*

But the payee and the assignee of these bonds have both practically stricken the word bearer out of the contract. The Peru &c., Railroad Company has not delivered them to bearer. They have assigned the bonds, we have seen, by endorsement. This fact even their own declaration discloses in making title to the bonds; Record, p. 3, *sup.* The plaintiffs accepted the transfer made in this form. They hold and make

title as assignees. It is rather late to claim as bearers. Had the bonds been passed over to the plaintiffs by delivery, that would have given effect to the word bearer. Every such subsequent holder without endorsement would then have been the bearer. But here the special endorsement of the Railroad Company payee, was made. That changes materially the legal relations of the payee and the assignee to each other. Instead of cutting out the defense of the maker, that defense, successfully made, creates a right of action in another direction. The payee thus assigning the bonds by endorsement, warrants that the maker is both liable and solvent. 2 Blackf., *sup.*

The plaintiffs are therefore not bearers of this paper; they have the higher right of assignees. In case of failure in this suit because of the invalidity of the bonds, the plaintiffs have their right of action against the railroad company on the implied obligation of the assignment, if they take the proper steps to fix that liability. See authorities on this point, *supra*, and Stoner *vs.* Ellis, 6 Ind. 152.

We come next to the authorities cited by the plaintiff. A few have already been examined. It is proposed to examine further some of the leading cases cited, and seemingly relied upon with most confidence by the plaintiffs.

An expression of the Judge who delivered the opinion in 13 Ind., 161, is taken from its proper connection and pressed into the service in the case at bar. It is a bare *dicta*, wholly outside of the conclusions of the Court on the facts. The case was this: Attachment against the Ohio, I. & T. Co., and a garnishee process against the Junction Railroad Company. The railroad company answered that they had issued bonds in the usual form, payable to Jones or bearer, at the office of the Trust Company, *in the City of New York;* that the Trust Company had held a number of the bonds at one time, but whether they held them then or not, or whether they had been negotiated, the respondent did not know; and hence could not admit any indebtedness to the Trust Company.

On this state of facts the Court below gave judgment against the garnishee.

The Supreme Court say, a person indebted by a note "not

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negotiable by the law merchant, may be made liable as garnishee, after such note has become due, and before it is assigned. *But the maker of a note or bond negotiable, by the law merchant stands upon a different footing.* Either the holder of the paper must be before the Court, or the plaintiff must prove that the negotiable paper is in the hands of the debtor at the time of the trial, in order that the garnishee might be protected by proper orders. The bonds of *railroad companies are not, it seems exactly governed by the law merchant.* But they pass by delivery like bank notes, so as to vest a complete title in the *bona fide* possessor. They are entitled to all the privileges of commercial paper, citing the Morris C. & B. Co. *vs.* Fisher, 1 Stockt. Ch., 667." And because they were commercial paper, and the attachment defendants non-residents, and not before the Court, nor the bonds shown to be in the hands of the Trust Company, the judgment below against the garnishee was reversed.

On this case, it is thought proper to observe,

1. That these bonds, made payable in New York, were by the law of that State, subject to the law merchant.

2. That the authority cited, 1 Stockt. Ch., *sup.*, was based upon a statute of New Jersey similar to that of New York, as will be shown more fully when we examine that case hereafter, and is not entitled to respect only as it expounds the New Jersey statute.

3. These were the bonds of a railroad company made payable in, and subject to the commercial law of New York, for the express purpose of putting them in market and raising money; and yet the Supreme Court of Indiana does not admit that they are "exactly commercial paper." If the Indiana Court speaks thus of the bonds of a commercial corporation, like a railroad, what would they say to the bonds of a municipality made and payable in Indiana, and subject to Indiana laws? Our Supreme Court, we have seen, hold County Boards to the limited sphere of municipal duties very strictly; and, when they assume to act beyond that sphere, the special legislative authority for so doing must be strictly pursued. 3 Blackf., *sup.*, and 8 Blackf., *sup.* So also, Mr. Justice Grier, in Oebrick *vs.* The City of Pittsburgh, 7 Am. Law Reg., 729 *and* 730.

It is well known that almost all sorts of paper in New York is governed by the law merchant. Hence the remark of the Judge in 13 Ind., *sup.*, that railroad bonds are entitled to all the privileges of commercial paper, however true of bonds payable in New York, like those then in controversy, can have no application to bonds payable in Indiana, and subject to her laws.

Smead *vs.* The Indianapolis, &c., Railroad Company, 11 Ind., 104, was also cited in argument below. This reference is still more unfortunate. It was there said that a note or bill purporting to have been given to a contractor for money due him for work on the road, when in fact nothing was due, would, IF GOVERNED BY THE LAW MERCHANT, be valid in the hands of a *bona fide* holder. Certainly, if *governed by the law merchant.* The old assumption over again. But how does that apply to bonds not governed by the law merchant, but by the assignment law of Indiana?

In the same case the Court further use the following language:

"The question was the power of a Railroad Company to exe cute bills of exchange, or give promissory notes. No express power was given in the charter; but the court held the power implied when necessary to carry on the construction of the road." The court then proceeds thus: "*The Company had no power therefore to execute merely* ACCOMMODATION *paper*, or paper to aid an undertaking not contemplated by its charter; and *such* paper if executed would be *void.* It would be *ultra vires.* Such paper it would seem must be void in the hands of *any assignee*, because its issue would be outside of the power of the corporation. A bill or note executed within the power of the corporation, but by an abuse of that power in the particular instance, would, if *governed by the law merchant* be valid in the hands of a *bona fide* holder. But when executed entirely without the corporate power, it would not—if indeed there could be a *bona fide* holder of such a bill."

Had not counsel better address themselves to the question whether this is commercial paper under the Statute of Indiana, than to thus constantly assume that important fact?

Why not show some judicial decision or later statute, taking such bonds as those at bar out of the operation of the Revision of 1843, above quoted? Railroads have been in operation over fifteen years in Indiana. If the Legislature did not intend their bonds, when payable in Indiana, to be governed by the law of assignment above quoted, but by the law merchant, they would have long since changed the statute in that behalf. The issuing of county bonds has been a practice almost coeval with the existence of the State; yet it is not pretended that there is any law which makes these bonds, when payable within the State, subject to the law merchant, or any statute that in any way distinguishes county bonds from those of natural or artificial persons. They are simply bonds, nothing more or less.

When railroads or counties wish to escape from the assignment laws of Indiana, it is well known the practice is to make them payable in the city of New York, and thus subject them to the law merchant.

The case of the Bank of Rome *vs.* The village of Rome, 19 New York, 20, is cited for the plaintiffs. That case, it will appear, can have application only to bonds governed by the law merchant. It arose under a law creating what is called Commissioners of the Railroad Fund of Rome. It provided that the village of Rome should subscribe stock in the Ogdensburg and Rome Railroad, as soon as $500,000 of other stock were subscribed to the road, of which subscription of $500,000 the certificate of said Commissioners, filed with the Clerk of the village of Rome, was to be the evidence. The certificate was filed, the stock taken, and the bonds of Rome issued to the Railroad Company. The suit was on one of these bonds, for $600, with coupons attached, and was brought by the holder, who received it by delivery. The bond was payable to bearer. The Court say these bonds were negotiable instruments so far as to preclude any defense against a *bona fide* holder. 2 Kernan, 625; 2 Hill, 159.

Of course they were negotiable; for the bonds of the village of Rome were governed by the following provisions in the New York statute, viz.: All notes in writing, made and signed by any person whereby he shall promise to pay to any other person, or his order or *bearer*, any sum of money

therein mentioned, shall be due and payable as therein expressed, and shall be negotiable in like manner as inland bills of exchange, according to the custom of merchants. 3 R. S. of N. Y., p. 67–8, section 1, edition, 1859.

Section 3, same page, provides that the endorsees may maintain actions against the makers in the same manner as on inland bills of exchange, and not otherwise.

The same statute defines the word *person*, to extend to every corporation capable by law, of making contracts; see same law. 1 R. S. of N. Y., p. 768, edition of 1859.

The foregoing statute has been in force over thirty years. at least, perhaps much longer. It underlies all other laws in New York, in relation to instruments for the payment of money. The special act under which the village of Rome issued her bonds did not assume to repeal or modify the general law, above quoted. The bonds were, of course, issued subject to it; the Court of Appeals could do nothing else than declare them negotiable according to the custom of merchants.

We did not dispute the law of this case in 19 N. Y., *sup.*, in the Court below. We are not now disputing it here. It is good law in New York. We only say and insist that it has no application to our domestic paper, made and payable in Indiana.

At an early day, New York adopted a certain system of laws to govern all contracts for the payment of money. Indiana saw fit to adopt a system somewhat different, on the subject of money contracts. The New York Courts are, of course, the proper expounders of her system. Is it logical or fair argument to quote and apply New York law to the purely domestic contracts of Indiana, when the parties had in view very different statutory provisions? Do the plaintiffs hope that this Court will interpolate the New York system into the Indiana statute. We have no apprehensions that this Court will assume that responsibility. Yet this is the plain English of the plaintiff's argument. This is the result to which that argument would urge the Court. The Indiana statute is not even quoted by counsel. The policy of Indiana in that behalf does not seem to be thought wholesome. The common law or the statutes of other States are

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preferred. Judicial disquisitions on these statutes wholly at variance with the statutes and policy of Indiana, are cited and urged as the rule of decision. The tenor of the argument would really imply that Indiana is not competent to change the common law: that she should not be tolerated to enact laws different from those of New York on commercial questions, or permitted to make instruments for the payment of money not negotiable and payable in Wall street.

If these bonds were only payable in the classic regions of Wall street, instead of at the Treasurer's office, in the County of Miami, we freely admit that as to the law merchant, the plaintiffs would have us sure enough. But the fact that they are payable at the County Treasury, is of itself very satisfactory that they were not intended to be brought under any custom of merchants. Nor is it easy to see how the plaintiffs can extricate themselves from the facts of the case and the statutes of Indiana, unless they assume that these bonds ought to have been payable in New York; and that in equity, what ought to have been done, will be regarded by the Courts as done!

Another case that is much relied upon is that of the Commissioners, of Knox County *vs.* Aspinwall, 21 Howard, 533. But a glance at the facts will show that it has no application to the case at bar.

In stating the case, the court say the suit was brought on 284 coupons, each of the sum of sixty dollars. The coupons were payable at the North River Bank, in the City of New York, and had been attached to bonds of $1,000 each, issued by the county, payable at the North River Bank, to the Ohio & Mississippi Railroad Company, or bearer, twenty-five years from date with interest; coupons payable annually at said North River Bank.

We have examined this case with great care, to detect if possible, its bearing on the case at bar. The court no where in words call these bonds and coupons commercial paper, or subject to the law merchant. And the reason is that no such question was mooted either in the Court below, or in this Court. But the paper is impliedly treated as subject to the rules of commercial law in the following terms, viz: "After the authority has been executed, it is too late to call it in

question to the prejudice of a *bona fide* holder of the bonds."

Why is it too late? Because the bonds and coupons were governed by the laws of Indiana? Not at all. But because the bonds and coupons were payable in New York, and thus governed by the law of New York which placed all paper for the payment of money to bearer, &c., on a footing with inland bills of exchange, according to the custom of merchants.

Yet this is one of the authorities cited to control the case at bar. Neither the logic, nor ingenuity of the learned counsel opposite, can bridge the chasm between these two cases. The one is governed by the laws of New York; the other by the laws of Indiana.

Another case much relied upon by the plaintiffs, is the somewhat notorious *Fisher Case*, as it is usually called. The Morris Canal, &c., *vs.* Fisher. 1 Stockt., Chy. R. 667.

The facts were briefly these: By several resolutions, the Canal Company had authorized the issue of bonds secured by mortgage. Fisher became the holder of some of these bonds, and sued the maker. Judgment for the plaintiffs below—the chancellor was interested, yet sat, assisted by a solicitor of the Court called to his aid. The latter delivered the opinion.

Judge Elmer, who delivered the opinion of the Court of last resort, admits that it is a case of first impression and great importance.

The Court admits that these bonds were not negotiable at common law. If assignable at all by delivery, it must be by virtue of the statute of New Jersey. But that statute, says the Court, leaves them subject in the hands of the assignee to all the equities to which they were subject in the hands of the assignor. R. Stats., N. J., 801.

The statute referred to by the Court, makes them subject to no other equities than "set-offs and discounts;" and neither of these were set up in the pleadings.

Nothing is said as to where they were made payable. On this, and other points, the opinion is strangely vague and unsatisfactory. A careful examination of it shows that the Court does not place the decision on the common law, nor yet does the Court commit itself squarely on the statute of

New Jersey. In the body of the opinion, the New Jersey statute is carefully eschewed. That the bonds in that case were negotiable paper seems to be deduced, not from the common law or from any statute; but from some higher law principles of judicial paternity. The bad eminence of an English Judge is deduced from his boast that he had outdone the parliament in making law. And in reading the opinion in the Fisher case one cannot but feel that there is more anxiety to make the law, than to enquire what the legislature of New Jersey had made it.

We would not be understood as disrespectful to the New Jersey Court. By no means. We simply state the facts as we find them. It is clearly a case in which, like Lord Mansfield's Colonial Judge, the decision is right, but the reasons given by the Court are altogether wrong.

This will be evident from a glance at the statutes which must have governed the case. It is quite probable, nay, certain, that the bonds were governed either by the law of New York or of New Jersey. The Court does not say where they were made or where payable. But as the bonds are payable to Palmer, and Palmer was one of the three trustees of the mortgage, said in that instrument to be denizens of New York, there is some reason to suppose that, like railroad bonds generally, they were payable in that city. In that event they were clearly governed by the law merchant, and it would have given far greater weight and satisfaction for the Court to have placed them squarely and frankly on the New York statute.

There is, however, some internal evidence that the bonds were both executed and made payable in New Jersey. To better comprehend the opinion, if possible, and ascertain where the merits really lay in regard to the character of the bonds, we turned to the New Jersey statute. That statute, as to this point, is in these words: "Assignments of bills, *bonds* and other writings obligatory for the payment of money, shall be good and effectual in law, and an assignee of any such may maintain an action of debt thereupon in his own name, but shall allow all just *set-offs* or *discounts* not only against himself, but against the assignor, before notice to the maker of such assignment."—New Jersey Statutes, 801–2.

Elsewhere in the same volume, page 799, the statute make "all notes in writing made by any person or body corporate, to any person or body corporate for the payment of money, subject to the law merchant, like inland bills of exchange; but repeats the provision for the allowance of all just set-offs or discounts." So that *set-offs* and *discounts* are the only matters that can be set up in defense to a New Jersey note or instrument for the payment of money.

In the Fisher case, neither set-off nor discount was attempted to be set up. Whether governed by the statute of New York or New Jersey, the judicial path seems plain.—Both statutes made the bonds commercial paper. In quoting the Fisher case, the courts of other States will adopt the law made by the legislature of New Jersey, and reject that so needlessly manufactured by the Court.—Sedgwick on statutes, chap. 7.

This notorious case, therefore, sinks after all into a common case of commercial paper, made so by the statute of the State where it was payable. The New Jersey court could have said so, and disposed of the case in a few words.

It would be vain to follow the plaintiff's authorities further. The cases cited all relate to paper subject to the law merchant. We again repeat and respectfully insist that the doctrine of these cases can have no application to a purely domestic contract like that at bar, made in Indiana, payable there and governed by her assignment laws.

We therefore infer that under the Indiana statute the defendant could well plead want of consideration, and hence that the demurrer below was correctly sustained.

FOURTH. *That the plaintiffs are chargeable with notice of all that the record of the Board of Commissioners contains in reference to the issue of these bonds, &c., and of the power of the Board to issue them, at the* TIME *and for the* PURPOSE *they were issued.*

The Board of Commissioners is an agent of the county, with special and limited powers; 3 Blackf., 501; 8 Blackf., 471; with such powers *only* as are conferred by statute. Revs. Stat., of 1843, 181, sec. 3.

The Auditor of the county is, *ex officio*, the clerk of said Board.

The Board is a court of record, and all its acts are entered of record, and can only be proved by the record. 7 Ind., R, 6. 5 Blackf., 325.

The Board being an agent with special and limited powers, it was incumbrent on the plaintiffs to show that it acted within the authority conferred in the issue of the bonds, &c., sued on. Story, on Agency, sec. 307*a*, and as that could only be done by the record, they will be held cognisant of all that the record contained.

The plaintiffs insist that, as the statute gave the Board authority to borrow money, and as the bonds recite, that they were given for a loan of the amounts thereof as authorized by that act, &c., they are required to look no farther, but might well presume that they were properly issued. But if our position be true that the Board can only bind the county by its record, then it is clear that the plaintiffs are chargeable with notice of what that record contains. They cannot read so much of the record as makes for them, and ignore that which is against them.

Again, these bonds recite, not only that they were issued under the authority of the act referred to, but, also, of the *resolutions of the Board.* Here notice of these resolutions is brought home to the plaintiffs. They are informed that they were a part of the authority for the issue of these bonds, and, while they hold the bonds in their hands, with this notice stareing them in the face, it is difficult for us to see how they can insist that they are *bona fide* holders *without notice.* Could these bonds have any legal existence without resolutions of the Board authorizing their issue?

The statute gave the authority to borrow money, but can it be insisted that, that statute created any legal liability against the county *until* she, through her Board of Commissioners, had authorized the money to be borrowed, or the issue of bonds for that purpose?

In this connection, we would refer the court to the case of Garrard *vs.* The Pittsburg & Connellsville Railroad Co., 5 Casey, (Penn.) R., 154; which was a suit upon a railroad bond, assigned to the plaintiff by the President of the company, in pursuance of an *order of the Directors.* In the case cited, the bond was *assigned* by the authority of an order,

Elsewhere in the same volume, page 799, the statute make "all notes in writing made by any person or body corporate, to any person or body corporate for the payment of money, subject to the law merchant, like inland bills of exchange; but repeats the provision for the allowance of all just set-offs or discounts." So that *set-offs* and *discounts* are the only matters that can be set up in defense to a New Jersey note or instrument for the payment of money.

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FOURTH. *That the plaintiffs are chargeable with notice of all that the record of the Board of Commissioners contains in reference to the issue of these bonds, &c., and of the power of the Board to issue them, at the* TIME *and for the* PURPOSE *they were issued.*

The Board of Commissioners is an agent of the county, with special and limited powers; 3 Blackf., 501; 8 Blackf., 471; with such powers *only* as are conferred by statute. Revs. Stat., of 1843, 181, sec. 3.

The Auditor of the county is, *ex officio*, the clerk of said Board.

The Board is a court of record, and all its acts are entered of record, and can only be proved by the record. 7 Ind., R, 6. 5 Blackf., 325.

The Board being an agent with special and limited powers, it was incumbrent on the plaintiffs to show that it acted within the authority conferred in the issue of the bonds, &c., sued on. Story, on Agency, sec. 307*a*, and as that could only be done by the record, they will be held cognisant of all that the record contained.

The plaintiffs insist that, as the statute gave the Board authority to borrow money, and as the bonds recite, that they were given for a loan of the amounts thereof as authorized by that act, &c., they are required to look no farther, but might well presume that they were properly issued. But if our position be true that the Board can only bind the county by its record, then it is clear that the plaintiffs are chargeable with notice of what that record contains. They cannot read so much of the record as makes for them, and ignore that which is against them.

Again, these bonds recite, not only that they were issued under the authority of the act referred to, but, also, of the *resolutions of the Board.* Here notice of these resolutions is brought home to the plaintiffs. They are informed that they were a part of the authority for the issue of these bonds, and, while they hold the bonds in their hands, with this notice stareing them in the face, it is difficult for us to see how they can insist that they are *bona fide* holders *without notice.* Could these bonds have any legal existence without resolutions of the Board authorizing their issue?

The statute gave the authority to borrow money, but can it be insisted that, that statute created any legal liability against the county *until* she, through her Board of Commissioners, had authorized the money to be borrowed, or the issue of bonds for that purpose?

In this connection, we would refer the court to the case of Garrard *vs.* The Pittsburg & Connellsville Railroad Co., 5 Casey, (Penn.) R., 154; which was a suit upon a railroad bond, assigned to the plaintiff by the President of the company, in pursuance of an *order of the Directors.* In the case cited, the bond was *assigned* by the authority of an order,

and in the case at bar, the bonds were *issued* by such authority. In that case, the court say, "As the assignment purported to be in pursuance of the *order of the Directors*, the purchaser was bound to look to the order: for, without it, the President had no authority to make the *transfer*." So, here, as these bonds purport to have been issued in pursuance of the order of the Board, &c., the plaintiffs were bound to look to the resolutions, for without them the bonds could not have been legally *issued*.

The resolutions of the Board, recited in these bonds and referred to in the pleadings, contain the agreement of the Railroad Company, (to which the bonds were made payable,) to pay said bonds both principle and interest as the same fell due; which was evidence to the world that they were not issued for the purpose of borrowing money, or for any other purpose for which the Board had the power to order their issue.

Upon this subject of notice, we would call your attention to the able opinion of this court in the case of Brush *vs.* Ware *et al.*, 15 Peters 110–114, and the cases there cited. In the case above quoted, the court considered and settled what was notice of a defect of title, apparent upon title-papers through which the party derived his title; the case at bar is a defect of power, shown by the resolutions under which the bonds, &c., sued on, purport to have been issued; and we insist that the same rule of notice applies in each case.

Again, these bonds not only recite that they were issued under the authority of the resolutions of the Board, but the Auditor, in executing them, states his anthority to do so in these words, to wit: "Witness Ira Mendenhall, Auditor of said county and *ex-officio* clerk of said Board of Commissioners, and the seal of said Board hereunto affixed by said Auditor, *by order of said Board at a regular meeting thereof, this 21st day of August*, 1851.

The above statement that the bonds were issued at a *regular meeting* of the Board, on the 21st day of August, 1851, could not be true, for, as we have already shown, there could be no regular meeting on that day. This was sufficient to put the plaintiffs upon inquiry. If the Board could hold no regular meeting upon that day, by what authority did they meet? Was there a special session called by the Auditor of

the county, by giving each of the Commissioners notice, in writing, specifying *the purpose* for which they were called together; and was *that* purpose the issuing of these bonds? These were questions of enquiry, presented to the plaintiffs on the perusal of these bonds, and if, with such evidence before them, they purchased the bonds, &c., in suit, they cannot now claim to be *bona fide* holders of this paper, without notice of the defendant's equities. When they are required to refer to the resolutions for *any* purpose, they are bound by all they contain. The Board had no power to bind the county, except at certain times fixed by law without special authority. 10 Ind., R. 361. They must, therefore, look to the record for that special authority.

The plaintiffs, in their complaint, allege that the bonds were issued by virtue of an act to authorize Miami and other counties to borrow money, and in their replication to the third and fourth pleas, they say that they were issued and delivered in payment of a subscription of stock to the Peru and Indianapolis Railroad Company. This we insist is a clear departure, which renders the replication bad. But, were it no departure to make such a reply, yet it is insufficient; for, admitting the county had the right to subscribe stock, yet she has no authority to issue bonds in payment thereof. Oebrick & Co. *vs.* The City of Pittsburg, Am. Law Register, vol. 7, p. 725, (729 and 730,) which is a recent case decided by Mr. Justice Grier. And in this connection it is particularly worthy of note, that the plaintiffs do not, in any part of their pleadings, allege, nor do the resolutions of the Board show, that the county either borrowed money, or, by their Board, authorized any money to be borrowed. Not only do these resolutions *fail* to show that the bonds were issued for a loan of money to the county, but they *do* show that they were issued for an entirely different purpose, and that a purpose for which the Board could not bind the county.

Again, the third and fourth pleas aver that these bonds were issued at special sessions of the Board, and the replication to these pleas fails to allege that the Board was legally convened for that purpose, or in any other way had authority to issue the bonds at that time.

It is alleged in this replication that ever since the issue of these bonds, the county has exercised the rights and privileges

of a stockholder in said Railroad Company, and have voted said stock at the elections for directors. To this allegation we rejoin, denying that the county had any of the rights or privileges of a stockholder, further than to vote for directors of the company; which right the county was permitted to exercise, not by virtue of being a stockholder, but under an agreement to that effect, while she remained the security of the Railroad Company. The surrejoinder to this rejoinder neither denies the new averments in the rejoinder, nor does it confess and avoid them, but simply reiterates what had already been alleged in the replication.

The replication to the sixth plea presents the same questions that we have discussed in the foregoing pages with the additional one, of the power of the Railroad Company to issue stock where there is no *bona fide* subscription, and to hypothecate such stock with a party who endorses their paper, or in any other manner lends them their credit.

As corporations have no powers except those conferred by statute, and as the statute nowhere gives the power to issue stock for such purpose, we submit, whether the issue of conditional stock was not a fraud upon the stockholders of said Company, and the stock itself void.

W. Z. STUART,
N. O. ROSS,
R. P. EFFINGER,
Attorneys for Defendants.

NOTE 1.—The following is a copy of the notice issued by the Auditor to convene the Board, at the time these bonds were issued.

STATE OF INDIANA, MIAMI COUNTY, *ss.*:

To the Sheriff of Miami County, Greeting.

You are hereby commanded to notify Hiram Butler, Samuel Jameson, and Frederick Hackley, to convene at the Auditor's Office, in the town of Peru, in Miami County, in said State, on the 19th day of August, 1851, at 10 o'clock on said day, to transact business of importance to the interests of the County, in relation to the subscription of stock to the Peru and Indianapolis Railroad Company. Of this they may not fail, and have you there this notice.

Witness my hand and the seal of the Board of Commissioners of the County of Miami, at Peru, the —— day of August, 1851.

IRA MENDENHALL, A. M. C.